

## Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

### First Intersessional Working Group Geneva, July 19 to 23, 2010

#### RECORD OF DELIBERATIONS AT THE FIRST INTERSESSIONAL WORKING GROUP (IWG 1)\*

*Document prepared by the Secretariat*

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\* This record has been prepared by the form of amendments made to the text under discussion at IWG 1 (WIPO/GRTKF/IC/17/4 Prov.), as well as in the form of comments made and questions raised at IWG 1 which are contained in the commentary section

<sup>1</sup> Delegation of Mexico

<sup>2</sup> Corlita Babb-Schaeffer. Lillyclaire Bellamy concurred, explaining that in a number of territories in the English-speaking Caribbean, there were no "indigenous people". The inhabitants of these states were people who had come willingly or by force. Over time, distinctive cultures and practices had been originated by these persons, who were not, strictly speaking, indigenous persons, but who needed to be considered as beneficiaries

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<sup>3</sup> Susanna Chung wished to see a more consistent use of terminology based on what was being used within the international systems and in other ongoing negotiations in the UN context. The phrase “traditional and other communities” was vague and could open up many questions. She preferred to have continuous reference throughout the text to “indigenous peoples and local communities”, which was comprehensive enough to cover the general concerns and was already the object of some understanding. Benny Müller concurred

<sup>4</sup> Delegation of Mexico

<sup>5</sup> Susanna Chung. See note 3

<sup>6</sup> Corlita Babb-Schaeffer. See note 2

<sup>7</sup> Susanna Chung. See note 3

<sup>8</sup> Delegation of Mexico

<sup>9</sup> Susanna Chung. See note 3

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<sup>10</sup> Delegation of Mexico

## I. OBJECTIVES

*The protection of traditional cultural expressions, or expressions of folklore,<sup>11</sup> should aim to:*

- (i) *Recognize value*  
*recognize that [indigenous peoples and non-indigenous peoples<sup>12</sup> and local communities<sup>13</sup> [and traditional and other cultural communities]<sup>14,15</sup>] and cultural communities or source communities<sup>16</sup> / owners and holders of traditional cultural expressions<sup>17</sup> [consider their cultural heritage to have intrinsic value]<sup>18</sup>, including social, cultural, spiritual, economic, scientific, intellectual, [commercial]<sup>19</sup> and educational values, and [acknowledge that]<sup>20</sup> recognize the value of<sup>21</sup> traditional [cultures] cultural expressions<sup>22</sup> and folklore which produces works protectable under intellectual property<sup>23</sup> [constitute frameworks of innovation and creativity that benefit [indigenous peoples and non-indigenous peoples<sup>24</sup> and local communities<sup>25</sup> [and traditional and other cultural communities]<sup>26]</sup><sup>27</sup>, as well as all humanity]<sup>28</sup>;*
- (ii) *Promote respect and preserve identity<sup>29</sup>*  
*promote respect for traditional [cultures] cultural expressions<sup>30</sup> and folklore which constitute expressions of creativity for both anonymous and collective works<sup>31</sup>, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the [peoples and communities]<sup>32</sup> that preserve and maintain expressions of these cultures and folklore and their cultural identity<sup>33</sup>;*
- (iii) *[Meet the actual needs of [communities]]<sup>34</sup>*  
*[be guided by] take duly into consideration<sup>35</sup> the aspirations and expectations expressed [directly]<sup>36</sup> by [indigenous peoples and non-indigenous peoples<sup>37</sup> and local]<sup>38</sup>*

<sup>11</sup> Note from the Secretariat: In these provisions, the terms “traditional cultural expressions” and “expressions of folklore” are used as interchangeable synonyms, and may be referred to simply as “TCEs/EoF”. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws

<sup>12</sup> Corlita Babb-Schaeffer. See note 2

<sup>13</sup> Delegation of Mexico

<sup>14</sup> Susanna Chung. See note 3

<sup>15</sup> Natacha Lenaerts suggested bracketing all occurrences of expressions referring to communities to highlight the great diversity of expressions in the text

<sup>16</sup> Miranda Risang Ayu

<sup>17</sup> Esteriano Mahingila, supporting a proposal made by Emmanuel Sackey

<sup>18</sup> Benny Müller said that everyone should recognize the value of TCEs as such, and not only recognize that a specific community attaches a certain value to them. Marisella Ouma concurred

<sup>19</sup> Xilonen Luna Ruiz said that the commercial interest was secondary and came up because of the specific features of certain communities. It could lead to misunderstanding, particularly between them and other communities who are against the commercialization of their culture. The term “commercial” referred to a secondary interest which was associated with certain specific features of some communities; that could be a risky term for many communities and could cause misunderstanding between those indigenous peoples and communities who were against the marketing of their culture

<sup>20</sup> Vittorio Ragonesi suggested replacing “acknowledge that” with “recognize the value of”

<sup>21</sup> Vittorio Ragonesi. See note 20

<sup>22</sup> Vittorio Ragonesi suggested changing “cultures” to “cultural expressions”

<sup>23</sup> Vittorio Ragonesi

<sup>24</sup> Corlita Babb-Schaeffer. See note 2

<sup>25</sup> Susanna Chung. See note 3

<sup>26</sup> Susanna Chung. See note 3

<sup>27</sup> Natacha Lenaerts. See note 15

<sup>28</sup> Vittorio Ragonesi. See note 20

<sup>29</sup> Sa'ad Twaissi. Marisella Ouma concurred

<sup>30</sup> Vittorio Ragonesi. See note 22

<sup>31</sup> Vittorio Ragonesi. See note 22

<sup>32</sup> Natacha Lenaerts. See note 15

<sup>33</sup> Sa'ad Twaissi. See note 29

<sup>34</sup> Natacha Lenaerts. See note 15

<sup>35</sup> Johan Axhamn said that whereas the aspirations and expectations expressed by the indigenous peoples were important, it could not be the sole decisive factor when determining the scope of protection. The interests of the public at large and of possible users also needed to be taken into consideration. Marisella Ouma concurred

<sup>36</sup> Youssef Ben Brahim. The term “directly” was not clear

<sup>37</sup> Corlita Babb-Schaeffer. See note 2

communities<sup>39</sup> and by traditional and other cultural communities<sup>40</sup>, [respect their collective<sup>41</sup> rights under national and international law]<sup>42</sup>, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such [peoples and communities]<sup>43;44</sup>

- (iv) [Prevent the [misappropriation] and misuse<sup>45</sup> so as to permit the appropriate use<sup>46</sup> of traditional cultural expressions/expressions of folklore] Protect the rights of holders of traditional cultural expressions/expressions of folklore<sup>47</sup> provide [indigenous peoples and non-indigenous peoples<sup>48</sup> and local<sup>49</sup> communities<sup>50</sup> [and traditional and other cultural communities]<sup>51;52</sup>] / holders of traditional cultural expressions/expressions of folklore<sup>53</sup> with the legal and practical means, including [effective enforcement] necessary<sup>54</sup> measures, in order to protect their rights concerning their traditional cultural expressions/expressions of folklore<sup>55</sup> / to ensure the protection of rights connected with traditional cultural expressions<sup>56</sup> [to prevent the misappropriation of their cultural expressions and [derivatives] and [adaptations]<sup>57</sup> therefrom, [and [control]<sup>58</sup> ways in which they are used beyond the customary and traditional context [and]<sup>59</sup> , promote the equitable sharing of benefits arising from their use and prevent use of their traditional cultural expressions which are derogatory of the traditional rights of communities<sup>60</sup> that would be prejudicial to the interests of the rights holders<sup>61;</sup>]<sup>62</sup>
- (v) Empower [communities]<sup>63</sup> be achieved in a manner that is balanced and equitable but yet effectively empowers [indigenous peoples and non-indigenous peoples<sup>64</sup> and local<sup>65</sup> communities<sup>66</sup> [and traditional and other cultural communities]<sup>67;68</sup> to exercise in an effective manner their<sup>69</sup>

<sup>38</sup> Susanna Chung. See note 3

<sup>39</sup> Delegation of Mexico

<sup>40</sup> Natacha Lenaerts. See note 15

<sup>41</sup> N. S. Gopalakrishnan stressed the collective, and not individual, nature of the rights. Xilonen Luna Ruiz concurred.

<sup>42</sup> N. S. Gopalakrishnan. Johan Axhamn stated that for legal certainty, there had to be a clear reference to what the international instruments were

<sup>43</sup> Natacha Lenaerts. See note 15

<sup>44</sup> Vittorio Ragonesi said that these objectives did not deal with IP. See also intervention by Anne Le Morvan, note 78. Rachel-Claire Okani found this objective redundant with principle (a) and suggested deleting it or moving it as objective (i)

<sup>45</sup> Delegation of Mexico

<sup>46</sup> Oswaldo Reques Oliveros

<sup>47</sup> Natacha Lenaerts suggested replacing the phrase “Prevent the misappropriation and misuse so as to permit the appropriate use of traditional cultural expressions/expressions of folklore” with “Protect the rights of holders of traditional cultural expressions/expressions of folklore”

<sup>48</sup> Corlita Babb-Schaeffer. See note 2

<sup>49</sup> Susanna Chung. See note 3

<sup>50</sup> Delegation of Mexico

<sup>51</sup> Susanna Chung. See note 3

<sup>52</sup> Natacha Lenaerts. See note 15

<sup>53</sup> Natacha Lenaerts

<sup>54</sup> Natacha Lenaerts suggested replacing “effective enforcement” with “necessary”

<sup>55</sup> Natacha Lenaerts

<sup>56</sup> Vittorio Ragonesi

<sup>57</sup> Delegation of the United States of America. The Delegation suggested “bracketing” all occurrences of “derivatives”. As an alternative to deletion, the Delegation proposed replacing “derivatives” with “adaptations”. The concept of “derivatives” did not exist in existing international IP texts in the same way that “adaptations” did. The right of adaptation was a well known right in Article 14 and Article 14bis of the Berne Convention. The derivative work right was established in some national laws. For consistency, if the concept was to remain in the text, “adaptations” was preferred. The Delegation of South Africa expressed its opposition to the proposal. Sa’ad Twaissi supported the proposal of the United States of America but suggested using both words “derivatives” and “adaptations”

<sup>58</sup> Delegation of Mexico

<sup>59</sup> Marisella Ouma

<sup>60</sup> Heng Gee Lim

<sup>61</sup> Marisella Ouma

<sup>62</sup> Vittorio Ragonesi. See note 56

<sup>63</sup> Natacha Lenaerts. See note 15

<sup>64</sup> Corlita Babb-Schaeffer. See note 2

<sup>65</sup> Susanna Chung. See note 3

<sup>66</sup> Delegation of Mexico

<sup>67</sup> Susanna Chung. See note 3

<sup>68</sup> Natacha Lenaerts. See note 15

<sup>69</sup> Delegation of Mexico

- collective<sup>70</sup> rights and authority over their own traditional cultural expressions/expressions of folklore;
- (vi) [Support customary [practices] systems<sup>71</sup> and [community]<sup>72</sup> cooperation respect and facilitate<sup>73</sup> and support through concrete measures<sup>74</sup> the continuing customary use, spiritual values,<sup>75</sup> development, exchange and transmission of traditional cultural expressions/[expressions of folklore]<sup>76</sup> by, within and between [communities]<sup>77</sup>;]<sup>78</sup>
- (vii) [Contribute to safeguarding traditional cultures contribute to the preservation and safeguarding of the environment in which traditional cultural expressions/expressions of folklore are generated [and maintained, for the direct and indirect<sup>79</sup> benefit of [indigenous peoples and non-indigenous peoples<sup>80</sup> and local<sup>81</sup> communities<sup>82</sup> [and traditional and other cultural communities]<sup>83,84</sup>, and for the benefit of humanity in general;]<sup>85,86</sup>]
- (viii) [Encourage] Promote<sup>87</sup> [community]<sup>88</sup> innovation and creativity Encourage,<sup>89</sup> reward and protect tradition-based creativity and innovation especially by [indigenous peoples and non-indigenous peoples<sup>90</sup> and local<sup>91</sup> communities<sup>92</sup> [and traditional and other cultural communities]<sup>93,94</sup>];
- (ix) Promote intellectual and artistic freedom, research and cultural exchange on equitable terms promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to [indigenous peoples and non-indigenous peoples<sup>95</sup> and local<sup>96</sup> communities<sup>97</sup> [and traditional and other cultural communities]<sup>98,99</sup>];
- [Contribute to cultural diversity

<sup>70</sup> N. S. Gopalakrishnan. See note 41

<sup>71</sup> Xilonen Luna Ruiz

<sup>72</sup> Natacha Lenaerts. See note 15

<sup>73</sup> Benny Müller proposed this addition to be in accordance with the document on TK

<sup>74</sup> Norman Bowman supported the proposal made by Robert Leslie Malezer

<sup>75</sup> Sa'ad Twaissi supported the proposal made by Lázaro Pary

<sup>76</sup> Xilonen Luna Ruiz

<sup>77</sup> Natacha Lenaerts. See note 15

<sup>78</sup> Anne Le Morvan said that this objective went beyond the Committee's remit, i.e., the protection of TCEs, and touched upon areas that were better dealt with in other fora. Vittorio Ragonesi and Natacha Lenaerts endorsed that statement

<sup>79</sup> Sa'ad Twaissi

<sup>80</sup> Corlita Babb-Schaeffer. See note 2

<sup>81</sup> Susanna Chung. See note 3

<sup>82</sup> Delegation of Mexico

<sup>83</sup> Susanna Chung. See note 3

<sup>84</sup> Natacha Lenaerts. See note 15

<sup>85</sup> Vittorio Ragonesi suggested ending the objective at "are generated"

<sup>86</sup> See intervention by Anne Le Morvan, note 78. Natacha Lenaerts concurred

<sup>87</sup> Luz Celeste Ríos de Davis

<sup>88</sup> Natacha Lenaerts. See note 15

<sup>89</sup> Benny Müller proposed this addition to be in accordance with the document on TK

<sup>90</sup> Corlita Babb-Schaeffer. See note 2

<sup>91</sup> Susanna Chung. See note 3

<sup>92</sup> Delegation of Mexico

<sup>93</sup> Susanna Chung. See note 3

<sup>94</sup> Natacha Lenaerts. See note 15

<sup>95</sup> Corlita Babb-Schaeffer. See note 2

<sup>96</sup> Susanna Chung. See note 3

<sup>97</sup> Delegation of Mexico

<sup>98</sup> Susanna Chung. See note 3

<sup>99</sup> Natacha Lenaerts. See note 15

- (x) *contribute to the promotion and protection of the diversity of cultural expressions and ensure their continuation and continuity<sup>100</sup>,<sup>101</sup>*
- [Promote the [community]<sup>102</sup> development of [indigenous peoples and non-indigenous peoples<sup>103</sup> and local<sup>104</sup> communities [and traditional and other cultural communities<sup>105</sup>]]] and legitimate trading activities
- (xi) where so desired by [communities]<sup>107</sup> [indigenous peoples and non-indigenous peoples<sup>108</sup> and local<sup>109</sup> communities [and traditional and other cultural communities<sup>110</sup>]]] and their members, promote the use of traditional cultural expressions/expressions of folklore for [community based] the<sup>112</sup> development of [indigenous peoples and local<sup>113</sup> communities [and traditional and other cultural communities<sup>114</sup>]<sup>115</sup>]<sup>116</sup>, recognizing them as an asset of the [communities]<sup>117</sup> that identify with them, such as through the development and expansion of marketing opportunities linked to culture and folklore<sup>118</sup> for tradition-based creations and innovations;<sup>119</sup>
- (xii) [Preclude unauthorized IP rights  
preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over traditional cultural expressions/expressions of folklore and [derivatives] [adaptations]<sup>120</sup> thereof;]<sup>121</sup>
- (xiii) [Enhance certainty, transparency and mutual confidence  
enhance certainty, transparency, mutual respect and understanding in relations between [indigenous peoples and non-indigenous peoples<sup>122</sup> and local<sup>123</sup> communities<sup>124</sup> [and traditional and cultural communities]<sup>125</sup>]<sup>126</sup>, on the one hand, and academic, commercial, governmental, educational and other users of traditional cultural expressions/expressions of folklore, on the other.]<sup>127</sup>
- (xiv) Respect for and cooperation with relevant instruments and processes.<sup>128</sup>

[Commentary on Objectives follows]

<sup>100</sup> Sa'ad Twaissi

<sup>101</sup> See intervention by Anne Le Morvan, note 78. Natacha Lenaerts concurred

<sup>102</sup> Natacha Lenaerts. See note 15

<sup>103</sup> Corlita Babb-Schaeffer. See note 2

<sup>104</sup> Susanna Chung. See note 3

<sup>105</sup> Delegation of Mexico

<sup>106</sup> Natacha Lenaerts. See note 15

<sup>107</sup> Natacha Lenaerts. See note 15

<sup>108</sup> Corlita Babb-Schaeffer. See note 2

<sup>109</sup> Susanna Chung. See note 3

<sup>110</sup> Delegation of Mexico

<sup>111</sup> Susanna Chung. See note 3

<sup>112</sup> Natacha Lenaerts. See note 15

<sup>113</sup> Susanna Chung. See note 3

<sup>114</sup> Delegation of Mexico

<sup>115</sup> Susanna Chung. See note 3

<sup>116</sup> Natacha Lenaerts. See note 15

<sup>117</sup> Natacha Lenaerts. See note 15

<sup>118</sup> Rachel-Claire Okani. The same point is made under objective (v)

<sup>119</sup> Vittorio Ragonesi. See note 44

<sup>120</sup> Delegation of the United States of America. See note 57

<sup>121</sup> Johan Axhamn suggested deleting this objective if it meant that copyright could not be obtained over adaptations of TCEs which were in the public domain

<sup>122</sup> Corlita Babb-Schaeffer. See note 2

<sup>123</sup> Susanna Chung. See note 3

<sup>124</sup> Delegation of Mexico

<sup>125</sup> Susanna Chung. See note 3

<sup>126</sup> Natacha Lenaerts. See note 15

<sup>127</sup> See intervention by Anne Le Morvan, note 78. Natacha Lenaerts concurred

<sup>128</sup> Benny Müller proposed adding this objective to acknowledge existing instruments such as the UNESCO 2003 and 2005 Conventions, as well as to link the draft provisions on TCEs to those on TK.

## COMMENTARY

### OBJECTIVES

#### Comments and Questions by Experts at IWG 1

Lillyclaire Bellamy sought clarification on the use of the word “communities” from Xilonen Luna Ruiz.

Xilonen Luna Ruiz said that the definitions of “indigenous peoples”, “indigenous communities” and “communities” were different. The “community” was a broader organization than a family. It was a system of political, cultural, social, religious and economic organization, which had common cultural features adopted in order to distinguish identity. The community distinguished the existence of otherness and identified it; its social, political and cultural authorities and institutions determined the limits of the community. Of note was the definition of “communality” by a former indigenous leader and thinker, Mixe Floriberto Díaz, with respect to a new concept which complemented the essence of the community: "Communality expresses universal principles and truths with respect to indigenous society, which should be understood from the outset, not as something opposed, but different, to western society. In order to understand each of its elements, certain notions must be taken into account: communal, collective, complementarity and completeness. Without bearing in mind the communal and complete sense of each part which we endeavor to understand and explain, our knowledge will always be limited". An indigenous community was the area in which indigenous identity was formed, from the point of view of what was sacred and ownership: the permanent link with the earth and territoriality. Similarly, it was an autonomous body which was governed with its own normative systems for imparting community justice. Those who were aware that they belonged to an indigenous community shared territory, natural environment and one or more native or adapted linguistic alternatives, interpersonal relations, knowledge, wisdom, shared histories, ideas, values, skills, feelings and emotions which were passed on from generation to generation and which were cultural expressions that formed part of their cultural heritage. The concept of indigenous people could have different embodiments. Indigenous people could define “territorial units that brought together a number of communities or lineages, determined by the establishment of a linguistic grouping; cultural characteristics or coexistence of normative systems which bind them to a territory or to ancestral collective thinking”. Defining indigenous people as a nation required a “broad territory with the coexistence of linguistic groupings, alternative dialects, normative systems and individuals who assigned to themselves the label of indigenous, all those together form cultural diversity”. The support for this diversity appeared in terms of common features in the use of their own languages, which were recognized by Mexico as national indigenous languages that gave a sense of belonging to groups with specific social, political and normative values, cultures and systems, around which they organized their lives and take their decisions. Another conception of indigenous people could be assigned to groups that lacked a traditional community system, but which assign to themselves the label of indigenous – which had seen their territories of origin plundered, forced displacements, reduction of territory to an entity that was not considered a community, migration and establishment in new settlements – and which in their new forms of organization assign to themselves the label of indigenous. Shafiu Adamu Yauri agreed and supported the position that TCEs were closely related to TK.

Miranda Risang Ayu proposed using the terms “cultural community” or “source community” and pleaded for broad and flexible language. Mohamed El Mhamdi also favored an inclusive approach. Paul Kuruk concurred and also supported the proposal by Emmanuel Sackey — subject to there being a section on definitions; alternatively, the text could refer to “indigenous peoples and other owners and holders of TCEs”. Moreover, he suggested recognizing clans and

lineages, because clans in the same tribe could have different rules regarding rights in TCEs, and one could not over emphasize the need to take into account the size of the relevant group in determining the rule of protection.

Norman Bowman suggested that the focus of the instrument be placed on “indigenous peoples”, and secondly, on local communities and the many forms these could take. Heng Gee Lim concurred and proposed that an agreement be reached on the proper term to be used. Norman Bowman proposed three main characteristics of TCEs: (1) the works are anonymous because of their age or because the artists creating works tend to identify themselves with a community or region rather than as individual artists or creator, (2) the TCE is traditional and (3) it is an artistic form of expression. The key element was the traditional element of a TCE. One approach was to define “traditional” as an expression that embodied the ritual knowledge of an indigenous people, recognized under the customary law and practices by that people. Susanna Chung and Justin Hughes concurred.

N. S. Gopalakrishnan insisted on the correlation between the communities and the TCEs.

Mohamed El Mhamdi reiterated the need to define the term “community” in a glossary, listing three categories of communities. First, “indigenous communities” had practices, laws, and customs; they managed their own development and protected their own TK and TCEs. Second, a “national community” was much broader in scope; it had national laws protecting cultural expressions. Third, “regional community” was needed to take into consideration the cultures that went beyond the boundaries of a single nation. For example, in North Africa, Andalucía culture was shared by three countries, which created the need for a local or regional instrument that would put into practice rights for that community. Youssef Ben Brahim concurred.

Vittorio Ragonesi recalled that the objective of the instrument, in accordance with the goals set in the Development Agenda, was to provide indirect protection to indigenous peoples or communities; in other words, protection for their works, what they produced, and not the community itself. Protection was for anonymous works, produced by people one could not identify individually, by a community or a group of people. Protection needed to be compatible with existing legal instruments at the international level, such as the Berne Convention. He also asked about the legal status of the objectives: were they general considerations or did they have a normative value?

Danny Edwards wondered if there was a contradiction between the requirement that TCEs be passed down from generation to generation and the fact that TCEs were protected from creation, according to Article 7. Margreet Groenenboom agreed.

#### Drafting Proposals by Observers at IWG 1

Preston Hardison proposed adding the objective of “protection against the exhaustion or loss of rights through the IP system”. He also supported the proposal by Susanna Chung that there should be some standard phrasing throughout.

Emmanuel Sackey proposed designating the beneficiaries with the phrase “owners and holders of TCEs” to do away with the controversies. Natacha Lenaerts concurred and so did Weerawit Weeraworawit, Esteriano Emmanuel Mahingila, Danny Edwards, Margreet Groenenboom, Innocent Mawire, Marisella Ouma, Shafiu Adamu Yauri and Johan Axhamn. But Preston Hardison disagreed, because a “holder” could mean an individual.

Jens Bammel suggested deleting the current text of objective (ix) and replacing it with one entitled “Maintain Human Rights Protection” and reading: “Uphold and protect the human rights

of creators, teachers, researchers and other individuals within and outside of indigenous communities".

Robert Leslie Malezer pointed out that there was no objective dealing with the capacity of communities to maintain their TCEs. In objective (vi), one could add: "respect, facilitate and support through concrete measures the continuing use, development etc."

Lázaro Pary suggested using other international instruments as sources for defining the key terms. He also said that it was appropriate to define subject matter not protected or for protection. The document omitted States' obligations, that is, the function of the State in preserving and protecting TK. He suggested rephrasing an objective as "*Recognize the intrinsic value and the historic dimension*". The concept of value was an economic concept, exchange value and use value. For indigenous peoples, TCEs embodied not only a material value but above all else a spiritual value, the memory of a people. He suggested adding, after social, cultural, *material*, spiritual value... After the word "creativity", he suggested adding "*which should or would benefit* indigenous peoples, traditional communities and other cultural communities". Moreover, he suggested adding "*Indigenous peoples and communities have contributed through their traditional knowledge and their cultural expressions to the progress of humanity*". He also made the following suggestions: promote (respect): to be replaced by *rights*. Promote, *protect and safeguard the constant development of traditional knowledge systems and folklore*,... after the word maintain, add *develop*... After the words "cultural communities", add: *respect their customary rights*. He also proposed replacing the Spanish word *duraderos* with *sustentables* (*sustainable, in English*), and replacing the word "prevent" with "*prohibit the misappropriation of TCEs/EoF*". He wished to rephrase "*Guarantee* (instead of provide) *the capacity of indigenous peoples and traditional communities to self-management within legal frameworks and customary practices*" – replace the Spanish word *indebida* with *ilícita* (*illicit in English*) – since *indebida* was neither obligatory nor liable... *delete "derivatives..."*. He also wished to replace the word "empower" with "*to strengthen or step up the capacity of communities*". Lastly, he wished to rephrase "*respect the customary right of indigenous communities to revitalize, use, develop and pass on to current and future generations their traditional knowledge and their expressions of folklore by and among their holders*" and "*value, reward and protect creativity...*"

Debra Harry said that the objectives in their entirety needed to protect the intrinsic value, recognition of non-IP indigenous-based systems that existed and support perpetual protection. Indigenous peoples, however, were seeking mechanisms to protect the holistic, inalienable, collective, and perpetual nature of indigenous knowledge systems for purposes far more expansive than profit making. TCEs were first and foremost the subject matter of indigenous peoples' customary law and protected by international human rights. Important work was already done by human rights experts, notably the work of Special Rapporteur Erica Diaz in her report "Principles and Guidelines for the Protection of the Heritage of Indigenous People". She wished to see objective (xii) remain in the text for further consideration, because there was a need to prevent erroneous grants of IP protection to misappropriated TCEs, taken without consent. A key objective was to prevent misappropriation and misuse.

## II. GENERAL GUIDING PRINCIPLES

- (a) *Principle of responsiveness to aspirations and expectations of relevant communities*
- (b) *Principle of balance*
- (c) *Principle of respect for and consistency with [international and regional agreements and instruments]<sup>129</sup>*
- (d) *Principle of flexibility and comprehensiveness*
- (e) *Principle of recognition of the specific nature and characteristics of cultural expression*
- (f) *Principle of complementarity with protection of traditional knowledge*
- (g) *[Principle of respect for rights of and obligations towards indigenous peoples and non-indigenous peoples<sup>130</sup> and [other traditional communities]<sup>131</sup> local<sup>132</sup> communities [and traditional and other cultural communities<sup>133,134,135</sup>]]*
- (h) *Principle of respect for customary use and transmission of TCEs/EoF*
- (i) *Principle of effectiveness and accessibility of measures for protection*

[Commentary on General Guiding Principles follows]

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<sup>129</sup> N. S. Gopalakrishnan. Johan Axhamn stated that for legal certainty, there had to be a clear reference to what the international instruments were

<sup>130</sup> Corlita Babb-Schaeffer. See note 2

<sup>131</sup> Susanna Chung. See note 3

<sup>132</sup> Susanna Chung. See note 3

<sup>133</sup> Delegation of Mexico

<sup>134</sup> Susanna Chung. See note 3

<sup>135</sup> Johan Axhamn believed that principle was a repetition of principle (c)

## COMMENTARY

### GENERAL GUIDING PRINCIPLES

#### Comments and Questions by Experts at IWG 1

Ndeye Siby proposed that particular emphasis be put in the preamble on the collective or community context of the rights. She also stressed the importance of the inter-generational aspect, the fact that TCEs were preserved and transmitted between generations. She also emphasized the close relationship between TCEs and people's identity.

Arjun Vinodrai asked how the issue of communities in diasporas, those which crossed borders and had travelled over time, would be handled.

Luz Celeste Ríos de Davis wished to obtain clarification on the principle of complementarity in principle (f). Anne Le Morvan concurred.

Sa'ad Twaissi proposed referring to oral history and customary law. He also suggested making reference to traditional medicine.

#### Proposals by Observers

Jens Bammel suggested adding to principle (b) "between the interests of indigenous peoples and communities, the human rights of creators and the public interest".

Ronald Barnes suggested adding a new objective (j) to address the existing violations of international rights and obligations to indigenous peoples.

### III. SUBSTANTIVE PROVISIONS

#### ARTICLE 1:

##### SUBJECT MATTER AND CRITERIA<sup>136</sup> OF PROTECTION

1. [“Traditional cultural expressions”<sup>137</sup> [and/<sup>138</sup>]<sup>139</sup> or “expressions of folklore” [are] and<sup>140</sup> any forms, [whether]<sup>141</sup> tangible [and][and/or<sup>142</sup>] or<sup>143</sup> intangible or a combination thereof<sup>144</sup> in which traditional culture [and knowledge are]<sup>145</sup> is<sup>146</sup> developed<sup>147</sup>, maintained, used<sup>148</sup>, expressed, [appear]<sup>149</sup> or [are] is<sup>150</sup> manifested, [and comprise:]<sup>151</sup> and [are]<sup>152</sup> [have been]<sup>153</sup>]<sup>154</sup> [passed on from generation to generation]<sup>155</sup><sup>156</sup>, and which constitute artistic works under the meaning of Article 2 of the Berne Convention<sup>157</sup>, including<sup>158</sup> / [such as but not limited to<sup>159</sup> the following forms of expressions or combinations thereof]<sup>160</sup> / including but not limited to<sup>161</sup>:
- a) [phonetic or]<sup>162</sup><sup>163</sup> verbal [or oral]<sup>164</sup><sup>165</sup> expressions, [such as: stories, epics, legends, poetry, riddles and other narratives; [words]<sup>166</sup>, language<sup>167</sup> signs, [names],<sup>168</sup> and symbols, oral expressions etc.<sup>169</sup>; and popular tales]<sup>170</sup><sup>171</sup>
  - b) musical or sound<sup>172</sup> expressions, [such as songs, rhythms, [and]<sup>173</sup> instrumental music and ritual chants]<sup>174</sup> [and popular tales]<sup>175</sup><sup>176</sup>,<sup>177</sup>

<sup>136</sup> Shafiu Adamu Yauri explained that this new title was meant to reflect the addition by the African group of experts of a new paragraph entitled “Protection Criteria”

<sup>137</sup> Esteriano Mahingila preferred “expressions of folklore” over “traditional cultural expressions”

<sup>138</sup> Delegations of Mexico and Venezuela (Bolivarian Republic of)

<sup>139</sup> Nativ Isayev suggested deleting the word “and”, as the term was not encountered subsequently

<sup>140</sup> Delegation of Nigeria

<sup>141</sup> Delegations of Australia, India, Nepal and Nigeria

<sup>142</sup> Delegation of Nigeria. The Delegation suggested replacing “and” with “and/or”

<sup>143</sup> Delegations of Australia and India. The Delegations suggested replacing “and” with “or”

<sup>144</sup> Delegations of Iran (Islamic Republic of) and Mexico

<sup>145</sup> Justin Hughes suggested deleting the reference to knowledge. Johan Axhamn, Esteriano Emmanuel Mahingila, Danny Edwards, Margreet Groenenboom, Natacha Lenaerts and Vittorio Ragonesi concurred. N. S. Gopalakrishnan called for caution and suggested not deleting “knowledge” because knowledge and expressions had a close relationship. Charity Mwape Salasini, Miranda Risang Ayu, José Mario Ponce and Weerawit Weeraworawit agreed

<sup>146</sup> Justin Hughes. See note 145

<sup>147</sup> Ndeye Siby. N. S. Gopalakrishnan concurred

<sup>148</sup> N. S. Gopalakrishnan suggested combining the subject matter description with the eligibility criteria

<sup>149</sup> Nativ Isayev

<sup>150</sup> Justin Hughes. See note 145

<sup>151</sup> Delegations of Colombia, Egypt, Iran (Islamic Republic of), Mexico, the Philippines and Venezuela (Bolivarian Republic of)

<sup>152</sup> Justin Hughes

<sup>153</sup> Justin Hughes explained that TCEs needed to have been passed down from generation to generation in order to qualify Norman Bowman concurred. See note 152

<sup>154</sup> Marisella Ouma suggested keeping “are”, instead of “have been”

<sup>155</sup> Delegation of Mexico

<sup>156</sup> Vittorio Ragonesi

<sup>157</sup> Vittorio Ragonesi

<sup>158</sup> Delegation of Mexico

<sup>159</sup> Delegations of Colombia, Egypt, Iran (Islamic Republic of), the Philippines and Venezuela (Bolivarian Republic of). The Delegations of Egypt and of the Philippines said that the definition should be left open for further additions. The Delegation of Egypt suggested adding at the end of the preamble paragraph “etc.”, so as to suggest that there were also other forms of TCEs. The Delegation of Iran (Islamic Republic of) was of the view that the definition was generally acceptable, however, given cultural diversity, the examples in the definition should not be considered exclusive

<sup>160</sup> Justin Hughes

<sup>161</sup> Justin Hughes. See note 160

<sup>162</sup> Delegation of Mexico

<sup>163</sup> Larisa Simonova

<sup>164</sup> José Mario Ponce, based on a proposal by Tomas Alarcón

<sup>165</sup> Larisa Simonova

<sup>166</sup> Larisa Simonova

<sup>167</sup> Larisa Simonova

<sup>168</sup> Norman Bowman

<sup>169</sup> Delegation of Egypt

<sup>170</sup> Makiese Augusto

<sup>171</sup> Justin Hughes suggested deleting all reference to examples. Ahmed Morsi disagreed, saying the examples had to remain in the text, it being understood that the list was not exhaustive

- c) *expressions by action, [such as dances, plays, ceremonies, rituals, [sports and traditional games]<sup>178</sup><sup>179</sup>] and other performances, theater, including, among others, puppet performance and folk drama, <sup>180</sup> artistic expressions<sup>181</sup><sup>182</sup>]*  
*[whether or not reduced to a material form]<sup>183</sup>; and,*
- d) *[tangible expressions, such as productions of art]<sup>184</sup> artistic expressions<sup>185</sup> / artistic productions<sup>186</sup>, in particular, drawings, designs, rock<sup>187</sup> paintings (including body-painting), wooden<sup>188</sup> carvings, sculptures, and the expressive elements of<sup>189</sup> mouldings,<sup>190</sup> pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, [food and drink]<sup>191</sup><sup>192</sup> needlework, textiles, glassware, carpets, costumes, works of mas,<sup>193</sup> toys, gifts and<sup>194</sup> handicrafts; musical instruments; stonework, metalwork, spinning,<sup>195</sup> and architectural and/or funeral<sup>196</sup> forms, [sacred places]<sup>197</sup><sup>198</sup>, insignia,<sup>199</sup> marks, symbols and tradition-based literary works<sup>200</sup>.]*

2. Legal protection should ensure protection against any infringement of traditional cultural expression/expression of folklore for commercial purposes.<sup>201</sup>

#### Protection criteria<sup>202</sup>

The specific choice of terms to denote the protected subject matter should be determined at the national, sub-regional and regional and local levels.<sup>203</sup>

- 2. *[Protection shall extend to [those] any<sup>204</sup> “traditional cultural expression[s]” or “expression[s] of folklore” [which] that [are] is:*

- a) *the product[s] of creative, and cumulative<sup>205</sup> [intellectual]<sup>206</sup> activity [, including [individual]<sup>207</sup> collective<sup>208</sup> and [communal]<sup>209</sup> creativity]<sup>210</sup>;*

<sup>172</sup> Delegation of Mexico

<sup>173</sup> Delegation of Mexico

<sup>174</sup> José Mario Ponce, following a proposal by Tomas Alarcón

<sup>175</sup> Delegation of Mexico

<sup>176</sup> Justin Hughes. Ndeye Siby concurred

<sup>177</sup> Justin Hughes

<sup>178</sup> Delegations of Bolivia (Plurinational State of), Mexico and Trinidad and Tobago

<sup>179</sup> Vittorio Ragonesi

<sup>180</sup> Delegation of Indonesia

<sup>181</sup> Justin Hughes

<sup>182</sup> Justin Hughes

<sup>183</sup> Marisella Ouma thought this was redundant with the mention of “tangible or intangible”

<sup>184</sup> Justin Hughes

<sup>185</sup> Justin Hughes. See note 184

<sup>186</sup> José Mario Ponce

<sup>187</sup> Makiese Augusto

<sup>188</sup> Delegation of Mexico

<sup>189</sup> Justin Hughes. See note 184

<sup>190</sup> Delegations of India and Mexico

<sup>191</sup> Delegation of Mexico

<sup>192</sup> Norman Bowman. Danny Edwards concurred

<sup>193</sup> Delegations of Mexico and Trinidad and Tobago

<sup>194</sup> Delegation of Mexico

<sup>195</sup> Delegation of Mexico

<sup>196</sup> Delegation of Mexico

<sup>197</sup> Xilonen Luna Ruiz. José Mario Ponce and Abbas Bagherpour Ardekani concurred

<sup>198</sup> Norman Bowman. Larisa Simonova agreed, especially since the notions of creative activity and misappropriation could not be applied to sacred places

<sup>199</sup> José Mario Ponce, following a proposal by Tomas Alarcón

<sup>200</sup> Issah Mahama. José Mario Ponce agreed

<sup>201</sup> Natig Isayev

<sup>202</sup> Makiese Augusto. Rachel-Claire Okani concurred

<sup>203</sup> Makiese Augusto

<sup>204</sup> Justin Hughes. Note from the Secretariat: The subsequent changes are made for grammatical purposes and are not attributed

<sup>205</sup> Makiese Augusto. Shafiu Adamu Yauri agreed

<sup>206</sup> Heng Gee Lim. Shafiu Adamu Yauri agreed

- b) [characteristic] indicative of authenticity/being genuine<sup>211</sup> of [a community's]<sup>212</sup> the<sup>213</sup> cultural and social identity and cultural [heritage]<sup>214</sup> of indigenous peoples and non-indigenous peoples<sup>215</sup> and local<sup>216</sup> communities [and traditional and other cultural communities]<sup>217</sup><sup>218</sup>; and
- b) ALT the unique product of an indigenous people or local community and is indicative of that people or community's cultural or social heritage,<sup>219</sup>
- c) maintained, used or developed by nations, states,<sup>220</sup> [such community]<sup>221</sup> holders of traditional cultural expressions<sup>222</sup> / indigenous peoples and non-indigenous peoples<sup>223</sup> and local<sup>224</sup> communities [and traditional and other cultural communities,<sup>225</sup><sup>226</sup> or by individuals having the right or responsibility to do so due to its cultural significance<sup>227</sup> / [in accordance with the customary laws<sup>228</sup><sup>229</sup> governing the distribution of water resources<sup>230</sup>, land tenure system or law<sup>231</sup>/ customary<sup>232</sup> normative systems<sup>233</sup> [and] or<sup>234</sup> traditional/ancestral<sup>235</sup> practices of [that community] those indigenous peoples and non-indigenous peoples<sup>236</sup> and local<sup>237</sup> communities [and traditional and other cultural communities<sup>238</sup><sup>239</sup>], or has an affiliation with an indigenous/traditional local<sup>240</sup> community.<sup>241</sup><sup>242</sup><sup>243</sup> ]]

<sup>207</sup> Margreet Groenenboom suggested removing the reference to individual creativity, as that was already covered by IP rights. Justin Hughes concurred. Miranda Risang Ayu disagreed

<sup>208</sup> Luz Celeste Ríos de Davis. Makiese Augusto concurred

<sup>209</sup> Margreet Groenenboom wondered how the term "communal" related to the concept used in the Berne Convention. Natacha Lenaerts concurred. Miranda Risang Ayu and Shafiu Adamu Yauri disagreed

<sup>210</sup> Justin Hughes

<sup>211</sup> Delegations of Brazil and Mexico. The Delegation of Brazil suggested that instead of using the word "characteristic", which was too general, other wording could be used to make it clear that TCEs should be "authentic and genuine"

<sup>212</sup> Natacha Lenaerts. See note 15

<sup>213</sup> Makiese Augusto

<sup>214</sup> Delegation of Brazil. The Delegation suggested that the word "heritage" be replaced by a word closer in meaning to the Spanish "patrimonio". The English version did not reflect the idea, present in the Spanish version, that TCEs had a dynamic and interactive nature

<sup>215</sup> Corlita Babb-Schaeffer. See note 2

<sup>216</sup> Susanna Chung. See note 3

<sup>217</sup> Delegation of Mexico.

<sup>218</sup> Susanna Chung. See note 3.

<sup>219</sup> Justin Hughes explained that only TCEs which could be localized or identified uniquely with a particular people or community could be protected

<sup>220</sup> Makiese Augusto

<sup>221</sup> Natacha Lenaerts. See note 15

<sup>222</sup> Natacha Lenaerts. See note 15

<sup>223</sup> Corlita Babb-Schaeffer. See note 2

<sup>224</sup> Susanna Chung. See note 3

<sup>225</sup> Delegation of Mexico

<sup>226</sup> Susanna Chung. See note 3

<sup>227</sup> Natacha Lenaerts

<sup>228</sup> Eduardo Tempone put "law" in the plural

<sup>229</sup> Delegations of El Salvador, Mexico and Nepal

<sup>230</sup> Sa'ad Twaissi

<sup>231</sup> Delegation of Nepal

<sup>232</sup> Makiese Augusto

<sup>233</sup> Delegations of El Salvador and Mexico

<sup>234</sup> Delegations of Australia and Mexico

<sup>235</sup> Delegations of Angola and Mexico. Shafiu Adamu Yauri added his voice to the discussions on the role of customary law in the text. It was the customary law that contained the values of the society and the rules governing their lifestyles. He suggested that whoever wanted to take advantage or benefit from a country's TCEs needed to familiarize himself with the customary rules or laws governing those TCEs

<sup>236</sup> Corlita Babb-Schaeffer. See note 2

<sup>237</sup> Susanna Chung. See note 3

<sup>238</sup> Delegation of Mexico

<sup>239</sup> Susanna Chung. See note 3

<sup>240</sup> Susanna Chung. See note 3

<sup>241</sup> Delegation of Nigeria

<sup>242</sup> Vittorio Ragonesi and Johan Axhamn wished to delete the reference to customary law. Miranda Risang Ayu, Heng Gee Lim and Ahmed Morsi disagreed

3. *[The specific choice of terms to denote the protected subject matter should be determined at the national, sub-regional<sup>244</sup> and regional and local<sup>245</sup> levels.]<sup>246</sup>*
3. ALT *Contracting parties may choose specific terms to denote the subject matter at the national, sub-regional, regional and local levels.<sup>247</sup>*
4. *Creation of protected traditional cultural expressions/expressions of folklore, as indicated in the given article, shall not be limited in time and space, new traditional cultural expressions/expressions of folklore created shall be entered in the list of those protected and their legal protection shall be permanent.<sup>248</sup>*

[Commentary on Article 1 follows]

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<sup>243</sup> N. S. Gopalakrishnan wished to delete paragraph (2) because it was narrowing down the eligibility of TCEs by imposing unnecessary conditions. The three cumulative requirements excluded many items from protection and treated them as being in public domain. There was also a lack of conceptual clarity: the conditions were bringing in the requirements of formal IP indirectly (such as originality or novelty) and were stricter than the eligibility requirements of formal IP. Subparagraph (a) brought in the element of creativity – and demanded that the community establish “intellectual creativity” – this was bringing in the notion of ‘originality’ or ‘novelty’ indirectly; the difficulty in establishing that was the reason for the effort to create a separate framework. The test to be applied to find out the subject matter was covered in paragraph (1). The fact that it was expressed satisfied the requirement of community involvement in its creation. Any additional test brought in the notion of “public domain” in the formal IP system which was not the correct principle for identifying the subject matter of TCEs. It was the first time that the term “intellectual creativity” was used in any IP law. It was unfair and conceptually wrong to insist on it for TCEs. The more difficult question was the standard of creativity to be established. This also excluded some of the items identified in paragraph (1) (a) such as “words, sign, name etc.”, it was impossible to establish intellectual creativity in such cases. Subparagraph (b) was also problematic – while one appreciated the need to find the link of TCEs with the community – this is tested in paragraph (1). The use of terms like “characteristic”, “genuine and authentic” or “unique” was an attempt to exclude many TCEs from the eligibility for protection. The fact that a TCE existed from generation to generation and it was still used by the communities indicated its “cultural and social identity” and that was to be presumed. Regarding subparagraph (c), it needed to be included – The fact of the use of TCEs even now by the communities. He suggested including it in paragraph (1). As long as the TCEs were still in practice, they needed to be protected once it was shown that they were expressions of cultural knowledge and existed from generation to generation

<sup>244</sup> Delegation of Mexico

<sup>245</sup> N. S. Gopalakrishnan

<sup>246</sup> N. S. Gopalakrishnan

<sup>247</sup> N. S. Gopalakrishnan

<sup>248</sup> Natig Isayev

## COMMENTARY

### ARTICLE 1: SUBJECT MATTER OF PROTECTION

#### Discussion Overview

Experts discussed Article 1 as formulated in document WIPO/GRTKF/IC/17/4 Prov.

Regarding the format of Article 1, the experts who took the floor were, broadly speaking, divided into two groups. On the one hand, some experts, including most observers, considered the format as appropriate. A few considered that it was necessary to include additional examples of protected subject matter in order to ensure inclusiveness. Sacred sites, traditional medicines and sacred songs were mentioned in that regard.

On the other hand, some experts considered that a slimmer article was a better option. A few experts were of the view that this could be achieved by removing all examples. Others proposed that references to TK, heritage-related (such as sacred sites) and trademark-related examples be removed. A few others suggested to merge partially or entirely paragraphs (1) and (2), either because subparagraphs (2)(b) and (2)(c) could be better dealt with under paragraph (1) as they were core components of the article, or because subparagraph (2)(a) seemed to be redundant with respect to paragraph (1).

Experts discussed subparagraph 2(c), which dealt with the intergenerational or traditional character of eligible TCEs/EoF. The experts were, broadly speaking, divided into three groups.

Some experts made a plea for a *status quo* of the paragraph in order to ensure that protection would cover TCEs/EoF that were maintained, used and developed by the relevant communities as “living” TCEs/EoF. Other experts considered that the intergenerational or traditional character (which, in other words, “have been passed from generation to generation”) had to be highlighted. A few experts were of the view that only genuinely artistic productions created by communities as contemporary products could be eligible for protection.

Regarding subparagraph 2(a), referring to protected TCEs/EoF as “products of creative intellectual activity, including individual and communal creativity”, a few experts considered that the reference to “individual creativity” had to be an important component of the eligibility criteria. Most experts who took the floor rather focused on eligible TCEs/EoF as products of collective creativity, or, in some cases, on “anonymous” TCEs/EoF.

With regard to the definition of the subject matter, as well as to other key terms, the experts collectively identified the need to include definitions/a glossary of key terms in the text and adopted in that regard a recommendation to the Committee that was reflected in the Summary Report of the IWG 1 (paragraph 6 of document WIPO/GRTKF/IWG/1/2), made available as document WIPO/GRTKF/IC/17/8.

#### Comments and Questions by Experts at IWG 1

*Definition of TCEs (Scope of Subject Matter): Open-ended / exhaustive nature*

Pavel Zeman suggested deleting subparagraphs (a) to (d) to avoid having a long and detailed list of examples. Natacha Lenaerts agreed. Abbas Bagherpour Ardekani, Shafiu Adamu Yauri and Regan M. Asgarali disagreed.

Benny Müller thought the definition was circular and wondered about the usefulness of the distinction between tangible and intangible, since, moreover, that distinction was not made in Article 3.

Luz Celeste Ríos de Davis wished to leave open the question of the protected subject matter and not to draw up a non-exhaustive list. Ahmed Morsi said this should be left to be dealt with at the national level. She said that TCEs should meet certain characteristics, such as those established by Augusto Raúl Cortázar, since 1942

- Traditional: It is timeless and is the fruit of historical customs and events, being passed on from one generation to the next.
- Popular: It was born of the people; it is part of life.
- Anonymous: The individual creator is not known; it is part of a way of life.
- Collective: It belongs to a collective; it is a product shared by the majority of the members of a community.
- Empirical: It is non-institutional; it is spontaneous and is passed on from one generation to the next.
- Functional: It works in real life: material, spiritual or social, collective needs.
- Dynamic: Incorporates elements which enrich it, that is, it is active and renovative.
- Valid: It has been preserved since a very long time ago up to the present, although it would have undergone variations.
- Community: regional, national or international.

Ahmed Morsi suggested using the terminology already existing at WIPO and UNESCO. He said that the public archives and databases created by member states could serve in identifying TCEs. He also said that protection of TCEs was not an end in itself, but had a significant social, economic and cultural function. TK and TCEs share the same background, also with genetic resources; this needed to be taken into account when registering and documenting TCEs.

#### *Link between TK and TCEs*

Xilonen Luna Ruiz said that TK was closely linked to TCEs; the limits were reached when a TCE was no longer part of its TK and became a functional item which had lost its meaning. Such prior TK was what provided the character of TCEs. In general, TK and biodiversity were linked to TCEs. For example, the Wixarika (Huichol) People of Mexico, using their TK, manufactured ceremonial objects as well as objects for marketing, based on revelations which were acquired by means of transmitting and recreating the original myths which they had inherited from their forebears and which, due to their creative quality in terms of originality and type of material, were considered works of art; the ceremonial objects were placed in natural sanctuaries and were linked, in some instances, to the consumption of hallucinogenic plants and to natural resources such as springs and hills. However, even so, the objects marketed held knowledge of the mythology and relate traditional, but not personal, knowledge such as the representation of myths and ceremonial stories. Such prior TK was what gave character to TCEs. For example, in the same Wixarika culture, making a twisted yarn frame provided a recurrent reference to the meaning of all or some of the five sacred places of their ancestral mythology, with each bead representing the individual itself and the iconography narrating a personal or community myth. She also added that the protection of a TCE would not necessarily grant protection to the underlying TK. TK was linked to cultural biodiversity, to nature which was surrounded by the beneficiaries of TK. That did not imply that only a TCE was TK. It was also worth considering the process by means of which TK was created so as to become a TCE and not the expression as a product.

### Drafting Suggestions by Observers

Ronald Barnes suggested adding in Article 1(1)(d) the word “tools”. He also preferred to keep the reference to TK and to make reference to the “development” of TCEs and control over such development. Debra Harry agreed and also suggested adding “technologies”. Ronald Barnes suggested adding, in paragraph (3) a reference to the international level. He also suggested changing subparagraph 2(a) to read: “including individual and collective creativity”, deleting the word “communal” and replacing it with “collective”. In Article (1)(3), he proposed adding “according to international law” after the word “determined”. Tomas Alarcón agreed, suggesting adding a reference to the “international” level.

Tomas Alarcón suggested adding “ritual chants” and “insignia and symbols” in subparagraph (d). He also suggested rewording paragraph 2(a) to read: “[...] including communal and individual creativity and the creativity of indigenous peoples”. Saoudata Walet Aboubacrine and Ronald Barnes concurred.

Miguel Pérez Solís suggested adding, in Article 1(1) a condition that TCEs are expressed, appear or are manifested “in their original form”. He also suggested deleting “and comprise” as well as “such as but not limited to” to avoid confusion. He also suggested adding in subparagraph (d) a reference to an artistic or creative element, so that, for example, terracotta or wood work or craftwork in general would not be included.

Lázaro Pary suggested reformulating Article 1 to read: “The purpose of this Agreement or Treaty is to protect traditional cultural expressions and expressions of folklore in all forms, whether tangible or intangible in which they are expressed, appear and are manifested in the cultural heritage and which are passed on from one generation to the next in time and space”. He suggested listing the examples, which were currently in the text, as follows: “Such legal protection of traditional cultural expressions against all illicit uses, stipulated in Article 1, will apply in particular to:

- (1) phonetic or verbal expressions, such as stories, *folk tales*, epics, folk legends, popular poetry; riddles and other narratives; signs and sacred names and symbols;
- (2) musical or sound expressions, such as songs, rhythms and *indigenous* instrumental music;
- (3) expressions by action, such as dances, *folkloric* representations, *ritual ceremonies*, *traditional games* and other performances, theater... and folk drama;
- (4) tangible expressions, such as works of art, in particular, drawings, paintings, sculptures, pottery, terracotta, mosaic, woodwork and jewelry; architectural and funeral forms”.

He suggested making paragraph (2) a separate article, which would state that: “TCEs are the products of creative intellectual activity, in particular the creativity of human engineering and of historic communities”.

## ARTICLE 2:

BENEFICIARIES OF THE PROTECTION<sup>249</sup>

*Measures for the protection of [national]<sup>250</sup><sup>251</sup> traditional cultural expressions/expressions of folklore are provided to<sup>252</sup>: / [should] shall<sup>253</sup> be] are<sup>254</sup> for the benefit of the identities of<sup>255</sup> indigenous peoples [and non-indigenous peoples]<sup>256</sup>] and [local]<sup>257</sup> communities<sup>258</sup>, or those from countries with common traditional cultural expressions<sup>259</sup> who recognize ownership of, and obligations to maintain, the traditional culture and knowledge embodied in the traditional cultural expressions/expressions of folklore in accordance with their customary law and practice<sup>260</sup> / from which they come<sup>261</sup> / individual groups, [families], tribes, [nations]<sup>262</sup><sup>263</sup><sup>264</sup> [and traditional and other cultural communities]<sup>265</sup> [or the nation]<sup>266</sup><sup>267</sup> , localities and regions<sup>268</sup> / or the countries, to which a traditional cultural expression/expression of folklore is specific<sup>269</sup><sup>270</sup><sup>271</sup> / [owners or holders of traditional cultural expressions]<sup>272</sup> / as specified in the appropriate cultural legislation of each country.<sup>273</sup>*

*The beneficiaries of the protection of traditional cultural expressions/expressions of folklore under this provision shall be the rights holders, comprising, nations, states, indigenous peoples and local communities, individual groups, traditional and other cultural communities, to which traditional cultural expressions/expressions of folklore is specific<sup>274</sup>.*

- a) *in whom the custody, care and safeguarding of the TCEs/EoF are [entrusted] presumed to be existing<sup>275</sup> [in accordance with their traditions and<sup>276</sup> / traditional and<sup>277</sup> customary laws<sup>278</sup> [and] or<sup>279</sup><sup>280</sup> practices and normative systems<sup>281</sup><sup>282</sup>, etc.<sup>283</sup>; [and] [or]<sup>284</sup>]*

<sup>249</sup> Youssef Ben Brahim

<sup>250</sup> Delegation of Morocco. The Delegation said that a nation had its own folklore, “national” folklore; however there was no mention of “national” TCEs

<sup>251</sup> Vittorio Ragonesi. Norman Bowman concurred. Abbas Bagherpour Ardekani disagreed

<sup>252</sup> Ndeye Siby

<sup>253</sup> Corlita Babb-Schaeffer. See note 2

<sup>254</sup> Rachel-Claire Okani

<sup>255</sup> Xilonen Luna Ruiz

<sup>256</sup> Corlita Babb-Schaeffer. See note 2. Lillyclaire Bellamy said that the use of the word “nation” in could serve to encompass “non indigenous persons”

<sup>257</sup> Norman Bowman

<sup>258</sup> Delegation of Mexico

<sup>259</sup> Xilonen Luna Ruiz

<sup>260</sup> Norman Bowman

<sup>261</sup> Vittorio Ragonesi

<sup>262</sup> Margreet Groenenboom

<sup>263</sup> Delegation of Iran (Islamic Republic of). The Delegation believed that the rights of holders were considered in the framework of the rights of society. In that regard, national legislation was important and could not be ignored. The rights of local communities who were real owners and their consent should particularly be observed

<sup>264</sup> Vittorio Ragonesi

<sup>265</sup> Susanna Chung. See note 3

<sup>266</sup> Delegation of Morocco. The Delegation said that the term “traditional communities” was much too broad and should be defined in a clearer and more precise way. See note 250

<sup>267</sup> Vittorio Ragonesi

<sup>268</sup> N. S. Gopalakrishnan

<sup>269</sup> Delegation of Mexico

<sup>270</sup> Note from the Secretariat: The broad and inclusive term “indigenous peoples and traditional and other cultural communities”, or simply “communities” in short, is used at this stage in these draft provisions. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws

<sup>271</sup> Corlita Babb-Schaeffer. See note 2

<sup>272</sup> Esteriano Mahingila, supporting the proposal by Emmanuel Sackey

<sup>273</sup> Carlos Serpas

<sup>274</sup> Makiese Augusto. Youssef Ben Brahim and Rachel-Claire Okani agreed. Eduardo Tempone agreed with a formulation that would read: “the beneficiaries and the right holders are the indigenous peoples and communities and each of these groups, families, tribes and nations”

<sup>275</sup> Delegation of India. The Delegation said that the term “entrusted” could have certain legal ramifications in terms of requiring evidence of the custody, care and safeguarding being entrusted to a particular community

<sup>276</sup> Youssef Ben Brahim

<sup>277</sup> Makiese Augusto

<sup>278</sup> Eduardo Tempone. Vitorio Ragonesi concurred

- b) who maintain, [control]<sup>285</sup>[<sup>286</sup> possess<sup>287</sup>, use [or] and<sup>288</sup> develop the traditional cultural expressions/expressions of folklore as being [characteristic]<sup>289</sup> [authentic and genuine]<sup>290</sup>[<sup>291</sup> indicative<sup>292</sup> / part<sup>293</sup> elements specific to<sup>294</sup> [of] their cultural and social identity [and] or<sup>295</sup> cultural heritage; or<sup>296</sup>
- c) [*in case of traditional cultural expressions /expressions of folklore specific to a locality, region or nation, the authority as determined by national law.*]<sup>297</sup>
- d) *cultural institutions or bodies, which have preserved and documented past and present traditional cultural expressions and where such records are still linked to living cultures which in some way maintain, control, use and develop the same communities, should employ progressive mechanisms to preserve and return traditional cultural expressions back to the communities, (iconography, knowledge, ritual objects, technologies, music, videos) etc., so that these are made available to the direct beneficiaries to generate benefits, with the aim of strengthening local identities.*<sup>298</sup>

*Protection measures shall also contribute to the safeguarding and preservation of traditional cultural expressions.*<sup>299</sup>

*In the case where traditional cultural expressions /expressions of folklore are shared by a group of peoples or indigenous or cultural communities disseminated in more than one State, all such communities shall have equal property rights, regardless of political borders.*<sup>300</sup>

## Article 2 ALT

*The beneficiaries of traditional cultural expressions /expressions of folklore include:*

- (1) *Indigenous peoples and communities,*
- (2) *Groups,*
- (3) *Families,*
- (4) *Tribes,*
- (5) *Nations,*
- (6) *Traditional communities and other cultural or national communities, and*
- (7) *Other classifications provided for in the legal and cultural criteria of each country.*

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<sup>279</sup> Delegation of Australia. The Delegation said that there would be difficulties in proving the relevant customary law for indigenous communities

<sup>280</sup> Natacha Lenaerts. Miranda Risang Ayu disagreed

<sup>281</sup> N. S. Gopalakrishnan. Eduardo Tempone disagreed

<sup>282</sup> Vittorio Ragonese

<sup>283</sup> Xilonen Luna Ruiz

<sup>284</sup> N. S. Gopalakrishnan

<sup>285</sup> Delegation of Trinidad and Tobago

<sup>286</sup> Heng Gee Lim explained that the insertion of the word “control” could actually be prejudicial to the rightful beneficiaries who may not be able to claim the rights. Because the word “control” seemed to imply that, a particular community would have full and effective control over use of their TCE; however in reality most communities were not in a position to control use and exploitation of the TCEs and that was the reason for discussion over special instruments. As a result, a lot of communities would not be able to qualify as beneficiaries because of the lack of control. Ahmed Morsi and Abbas Bagherpour Ardekani concurred

<sup>287</sup> Makiese Augusto

<sup>288</sup> Xilonen Luna Ruiz

<sup>289</sup> Ndeye Siby. Abbas Bagherpour Ardekani disagreed

<sup>290</sup> Delegation of Brazil. The Delegation reiterated its comments made under Article 1 regarding the English equivalent to the Spanish “patrimonio”. See note 214

<sup>291</sup> N. S. Gopalakrishnan. Abbas Bagherpour Ardekani agreed

<sup>292</sup> N. S. Gopalakrishnan. Abbas Bagherpour Ardekani agreed

<sup>293</sup> Ahmed Morsi

<sup>294</sup> Xilonen Luna Ruiz

<sup>295</sup> N. S. Gopalakrishnan

<sup>296</sup> N. S. Gopalakrishnan

<sup>297</sup> N. S. Gopalakrishnan. Eduardo Tempone disagreed, claiming this added paragraph would fit better under Article 4

<sup>298</sup> Xilonen Luna Ruiz

<sup>299</sup> Nadia Mokrani

<sup>300</sup> Sa'ad Twaissi

If, and only if, it has been ascertained that the above have custody of traditional cultural expressions /expressions of folklore in accordance with their customary laws and practices, and administer and develop traditional cultural expressions /expressions of folklore as being authentic and genuine.<sup>301</sup>

Option 1: merge (a) and (b)

(a) in whom the custody, care and safeguarding of the traditional cultural expressions /expressions of folklore are entrusted and who use the traditional cultural expressions /expressions of folklore as being characteristic of their cultural and social identity and cultural heritage.

Option 2: merge (a) and (b)

(b) when it is determined that the previously mentioned groups take care of and safeguard traditional cultural expressions /expressions of folklore in accordance with their customary laws and practices and maintain and develop them as authentic and genuine.<sup>302</sup>

[Commentary on Article 2 follows]

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<sup>301</sup> Carlos Serpas

<sup>302</sup> Vittorio Ragonesi

## COMMENTARY

### ARTICLE 2: BENEFICIARIES

#### Discussion Overview

Extensive discussion took place regarding the identification of beneficiaries and the terms used to describe them, based on Article 2 of WIPO/GRTKF/IC/17/4 Prov.

A broad consensus emerged among the experts who took the floor on the need to use the same terms throughout the text as well as to consider the terms that were found in other relevant international instruments. Many experts highlighted the need to accommodate the variety of social and legal situations that prevailed in each country, and therefore to be flexible when adopting those terms.

Experts nevertheless diverged on the precise terms that should be used.

Some experts suggested “holders and owners of TCEs/EoF” as the most desirable terms, arguing for neutrality and flexibility. Other experts, including many observers, supported the terms as envisaged in Article 2 of WIPO/GRTKF/IC/17/4 Prov., namely “indigenous peoples and local communities”, arguing for a definition of beneficiaries which would not seem according to experts the circular, vague or inconsistent with the 2007 UN Declaration on the Rights of the Indigenous Peoples. Other experts proposed to describe the beneficiaries as “national, regional, cultural, traditional and other communities as well as individual groups”, arguing for the need to reflect situations where the right holders were not necessarily indigenous or local, but could share TCEs/EoF with other right holders within one country (possibly with all nationals of that country) or several countries. A few experts made alternative proposals to include states, tribes or families as beneficiaries.

A few experts proposed to approach the issue of definition from another angle, either by considering that the definition of the beneficiaries should be left in specific cases to national authorities as a principle to be reflected in a new paragraph (c) within Article 2 (with possible implication on Article 4), or by adopting a definition that would designate the individuals or groups that would not enjoy protection. Some experts flagged the possibility to invite the Committee to keep the issue open for later consideration.

With regard to the definition of beneficiaries, as well as of other key terms, the experts collectively identified the need to include definitions/a glossary of key terms in the text and adopted a recommendation to the Committee that is reflected in the Summary Report of the IWG 1 (paragraph 6 of document WIPO/GRTKF/IWG/1/2), made available as document WIPO/GRTKF/IC/17/8.

The experts also discussed Article 2(a), and focused on the proposed reference to “customary law [and] or practices” as the context in which ownership of rights should be tested.

Some experts, including most observers, expressed support for such a reference, arguing that TCEs/EoF were part of a holistic and *sui generis* context where customary law and practices played a defining role and should serve therefore as a source of law at the national and international level without, however, prejudicing the hierarchy of norms between common law and customs. One expert proposed to add “other normative systems” in order to make that reference more inclusive.

Other experts proposed instead the deletion of that reference, arguing for legal certainty, safeguarding mechanisms for legitimate third party users, and consistency in terms of hierarchy of norms at the national and international level.

Many experts mentioned that other articles raised similar questions concerning the role of customary law and practices, and requested therefore a consistent approach throughout the text.

The eligibility criteria as described in Article 2(b) were also discussed. While some experts pleaded for a broad *status quo* of the text, others expressed concerns that those criteria, which they branded as “qualitative,” further restricted the scope of protection of Articles 1 and 2. Some of those experts were particularly critical of the characteristic nature or authentic/genuine character of the eligible TCEs/EoF that right holders would need to maintain as part of their identity and heritage in order to be recognized as beneficiaries. Those experts considered that such a test implied value statements and noted that it was not foreseen under the copyright regime. Similarly, the need for beneficiaries to “control” the eligible TCEs/EoF was questioned as unduly restrictive.

One expert drew attention to the fact that the criteria as defined in Article 2(a) and (b) could be considered either as alternative (the option that expert favored) or cumulative.

Most experts recognized that Article 2 and 4 had to be considered jointly, while it was also assumed that the beneficiaries should not necessarily be the ones managing the rights. A clear distinction of principle had to be made between them and the managing authority.

### Comments and Questions by Experts at IWG 1

#### *Scope of beneficiaries*

Arjun Vinodrai suggested looking at the issue in negative terms, i.e., looking at which communities would not be included as beneficiaries.

Xilonen Luna Ruiz stated that the major problem with public policies was that of achieving respect, value, real needs, preventing misappropriation, empowering communities, supporting normative systems, contributing to protection, etc. This was established in the objectives. In numerous countries that was precisely how the subject was defined, TCEs were born of the intellect and skills in processes and expressions of human collectivities, and defining the subject matter allowed recognizing the cultural diversity of a country or of large cultural regions. It was therefore appropriate to call it by its name, i.e., “indigenous peoples, indigenous communities, cultural communities, tribes, origins, etc.”, so as to avoid assumptions. She wondered who would guarantee that an element was genuine. It was only collective property and faced with recognizing the difference when compared to others. Where Article 2 mentioned “as beneficiaries of national folklore”, this had to be referred to as cultural regions of TCEs. She gave the example of the peoples of Northern Mexico who shared bi-national Mexican-North American cultures such as the Cucapa, Tohono O’odham or Kumeyaay, who shared the same rituals and sacred places, for example, the “Bikita” ceremony in Tohono O’odham who lived in the USA, every year indigenous North Americans went to a sacred place in the Quitovac desert. She also gave the example of the former Guatemalan nationalized peoples exiled due to the war in Guatemala in the 1980s who lived in Mexico. However, conversely, despite their living conditions, they enriched the country culturally and every day demanded greater recognition.

Nemon Mukumov, in a written statement, wondered who owned the rights on TCEs. He said the owner of rights in TCEs had to, above all, be the State itself, and if some other subject made an

intellectual contribution (registered or compiled a collection), he should also be considered the owner of the rights in his intellectual endeavors. Many questions arose among the peoples and ethnic groups living close by as to how to determine whom the folklore belonged to. In the majority of cases, there was a multitude of similarities in the traditions and customs of peoples living in neighboring states. This related in particular to determining whom folklore belonged to.

Santiago Velázquez said that he agreed that the beneficiaries had to be the local communities and peoples from whom the TCEs emanated. However, a distinction between the beneficiaries and the rights holders had to be maintained. He disagreed with Eduardo Tempone, Makiese Augusto and Norman Bowman. Peoples and communities had every right to be the beneficiaries, but this was still part of a cultural heritage which in turn was inherent to each state. It was not acceptable that TCEs be owned by a group by chance, which could be detrimental to the indigenous people itself, as well as to the state.

#### Drafting Suggestions by Observers

Tomas Alarcón had reservation with regard to the notion of “national folklore”.

Lázaro Pary suggested that the words “nation” and “cultural communities” be deleted. He proposed the following: “Legal protection of TCEs, national and universal expressions should be for the essential purpose of benefitting the right holders who are the indigenous peoples and communities and social groups within the nations”. On subparagraph (a), he suggested: “the indigenous peoples in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with the customary law and practices and international law”. He further proposed the following:

#### “Article 2: Beneficiaries

The essential aim of measures for the legal protection of national and universal TCEs/EoF is to ensure benefits to the indigenous peoples and communities and social groups (remaining text to be deleted):

- (i) in whom the custody...
- (ii) who maintain (control?), use or develop TCEs/EoF as being authentic and genuine of their cultural and social identity and cultural heritage”.

Miguel Pérez Solís suggested adding, in subparagraph (a), “only in appropriate prior consultation with”. In subparagraph (b), he suggested adding “has not been collected”. He also suggested adding a subparagraph (c), which would read: “The above mentioned peoples and communities living in border regions should indicate to the agency mentioned in paragraph (1) where they live the majority of their time”.

Robert Leslie Malezer proposed, for Article 2, the following: “Indigenous peoples and local communities should have protection through measures to maintain, control, care for, safeguard, use or develop their TCEs. These measures may be achieved through a *sui generis* system or, where the indigenous peoples or communities so request, through statutory law developed in accordance with and to their requirements. Indigenous peoples and local communities should also have the means through their own cultural institutions to resolve disputes within their communities and societies, and have access to a just, fair and independent system of arbitration, giving due consideration to the customs, traditions and legal systems of the indigenous peoples and local communities, where conflict or disputes exist with parties or other interests regarding their collective rights over the TCEs”. Debra Harry concurred.

Ronald Barnes recommended taking out the word “national” in the first line of Article 2, because it was inconsistent with the meaning and intent of the beneficiaries and replacing it with “international”.

Marcus Goffe proposed a definition of “community”, which was “a group of people with a common history, ethnicity, ancestry, language identity, geographical location or culture”. He also wished the document to focus on communities, while recognizing that nations or states were also holders of TCEs. In that sense, he supported Debra Harry’s recommendation that Article 2(1) focus on communities and that Article 2(2) focus on national TCEs. In Article 2(2)(a), he suggested adding “presumed to be vested”. In Article 2(2)(b), “control” could remain, so long as the word “or” was retained. He also supported “characteristic” or “indicative”. Article 2(2)(c), he recommended that it state “where there are no TCEs which are identifiable with any particular indigenous community or communities, then the authority should be determined by national law”.

## [ARTICLE 3:

[ACTS OF MISAPPROPRIATION AND MISUSE<sup>1</sup> (SCOPE OF PROTECTION)]<sup>2</sup>

RIGHTS CONFERRED AND SCOPE OF PROTECTION<sup>3</sup>

[Contribute to the promotion and protection of the diversity of cultural expressions.<sup>4</sup>

Promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and non-indigenous peoples<sup>5</sup> and [traditional and other cultural]<sup>6</sup> local<sup>7</sup> communities<sup>8</sup>, as well as for the users of traditional cultural expressions/expressions of folklore and which reflect the broader interests of society.<sup>9</sup>

Promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore.<sup>10</sup>

Be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and non-indigenous peoples<sup>11</sup> and local<sup>12</sup> communities [and traditional and other cultural communities]<sup>13</sup> to exercise in an effective manner their rights and authority over their own traditional cultural expressions/expressions of folklore.<sup>14</sup>

Respect the continuing customary use, development, exchange and transmission of traditional cultural expressions/expressions of folklore by, within and between communities.<sup>15,16</sup>

[Traditional cultural expressions/expressions of folklore [of particular value or significance] registered or notified<sup>17</sup>

1. In respect of traditional cultural expressions/expressions of folklore [of particular cultural or spiritual value or significance to a community, and]<sup>18</sup> [which have been registered or notified as referred to in Article 7]<sup>19</sup>, and fulfill the criteria of Article 1<sup>20</sup> there shall be

<sup>1</sup> Delegation of Mexico

<sup>2</sup> Issah Mahama

<sup>3</sup> Issah Mahama

<sup>4</sup> Delegation of Canada. The Delegation proposed adding a “chapeau” to the article. It was important that the objectives were reflected in the articles, as the three parts of the document were interlinked and could not be treated in isolation. The substantive draft provisions would sound more comprehensive and enable the Committee to make better and informed decisions on the content of the articles. The chapeau could be used as a preamble to an international instrument on TCEs. This is Objective ix. When addressing the issue of misappropriation, it was important to keep in mind that cultures grew by, for example, learning from other cultures

<sup>5</sup> Corlita Babb-Schaeffer. See note 2

<sup>6</sup> Susanna Chung. See note 3

<sup>7</sup> Susanna Chung. See note 3

<sup>8</sup> Delegation of Canada. See note 4. This is Objective x

<sup>9</sup> Delegation of Canada. See note 4. This is proposed added text to Objective x

<sup>10</sup> Delegation of Australia. It was important to refer back to objectives iii, v and vii

<sup>11</sup> Corlita Babb-Schaeffer. See note 2

<sup>12</sup> Susanna Chung. See note 3

<sup>13</sup> Susanna Chung. See note 3

<sup>14</sup> Delegation of Australia. See note 10

<sup>15</sup> Delegation of Australia. See note 10

<sup>16</sup> Ndeye Siby suggested deleting the reference to those objectives

<sup>17</sup> Delegation of Mexico

<sup>18</sup> Delegation of Mexico

<sup>19</sup> Delegation of Australia. The Delegation wondered whether the economic and moral rights would be determined by the provision or be dependant on government registration. Consideration had to be given to leaving the option open to the communities, as to whether

*adequate and effective legal and practical measures to ensure that the [relevant community]<sup>21</sup> beneficiaries, that may be a nation, a people or an indigenous community or other community,<sup>22</sup> / indigenous people and non-indigenous peoples<sup>23</sup> or [traditional and other cultural]<sup>24</sup> local<sup>25</sup> community<sup>26</sup> can prevent or stop<sup>27</sup> the following acts taking place [without its free, prior and informed consent]<sup>28</sup>:*

- a) *in respect of such traditional cultural expressions/expressions of folklore [other than words, signs, names and symbols]<sup>29</sup>:*
  - (i) *the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or [derivatives] [adaptations]<sup>30</sup> thereof;*
  - (ii) *any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the [community] indigenous peoples and non-indigenous peoples<sup>31</sup> and [communities and traditional and other cultural]<sup>32</sup> local<sup>33</sup> communities<sup>34</sup> or the nation<sup>35</sup> as the source or owner<sup>36</sup> of the traditional cultural expressions/expressions of folklore, except where omission is dictated by the manner of the use<sup>37</sup>;*
  - (iii) *any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore, [done in order to cause harm thereto]<sup>38</sup> or any action that may be prejudicial to the expressions, that would offend against or would damage the reputation, customary values or cultural identity or integrity of the community<sup>39</sup> or nation<sup>40</sup> / to the reputation or image of the community,*

they could exercise their rights through a national authority, through another type of organization acting on their behalf, or to exercise their rights themselves within their communities.

<sup>20</sup> Margreet Groenenboom

<sup>21</sup> Delegations of Mexico and of Morocco. Both delegations suggested alternative text. In addition, the Delegation of the United States of America suggested using the phrase: "relevant community" throughout the document. The phrase would be best defined in Article 2. Long phrases such as "relevant indigenous people or community, traditional and other cultural community" did not serve clarity. The Delegation of South Africa opposed this change and suggested keeping "relevant indigenous people or community, traditional and other cultural community"

<sup>22</sup> Delegation of Morocco. This language was proposed to ensure that the beneficiaries could be a nation

<sup>23</sup> Corlita Babb-Schaeffer. See note 2

<sup>24</sup> Susanna Chung. See note 3

<sup>25</sup> Susanna Chung. See note 3

<sup>26</sup> Delegation of Mexico

<sup>27</sup> Delegation of Algeria. This addition is to reflect situations during which the act is taking place

<sup>28</sup> Delegation of India. The Delegation of South Africa opposed this change and proposed keeping the phrase in the text

<sup>29</sup> Delegation of South Africa

<sup>30</sup> Delegation of the United States of America. See note 57

<sup>31</sup> Corlita Babb-Schaeffer. See note 2

<sup>32</sup> Susanna Chung. See note 3

<sup>33</sup> Susanna Chung. See note 3

<sup>34</sup> Delegation of Mexico

<sup>35</sup> Delegation of Egypt. The Delegation stated that there were countries where there was only one single community, because cultural harmony prevailed. Egypt's history went back many years. It had a longstanding, rich and diverse culture which made for a harmonious and homogenous cultural weave. For that reason, the Delegation wished to include in the document, when referring to indigenous peoples and communities, the term "nations". The Delegation of Morocco concurred

<sup>36</sup> Delegation of Zambia. It suggested that the communities also be recognized as owners of the works, because of the particular meaning in law of "ownership", which included a positive right. That reflected the rights of ownership

<sup>37</sup> Delegation of the United States of America. The Delegation recommended that the provision include a phrase taken from Article 5 of the WPPT: "except where omission is dictated by the manner of the use". The Delegation explained that in practical circumstances it was not always possible or appropriate to provide attribution

<sup>38</sup> Youssef Ben Brahim

<sup>39</sup> Delegation of Zambia. proposed addition

<sup>40</sup> Delegation of Egypt. See note 35. The Delegation of Morocco concurred

- (iv) *indigenous peoples and non-indigenous peoples<sup>1</sup> and local<sup>2</sup> communities or region or nation<sup>3</sup> to which they belong<sup>4</sup>; and*
- (v) *[the acquisition or exercise by unfair or unconscionable action<sup>5</sup> of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof]<sup>6</sup>;*
- b) *in respect of words, signs, names and symbols which are such traditional cultural expressions/expressions of folklore, [any use of the traditional cultural expressions/expressions of folklore or [derivatives] [adaptations]<sup>7</sup> thereof for commercial purposes or other than their traditional use<sup>8</sup>, or the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or [derivatives] [adaptations]<sup>9</sup> thereof,]<sup>10</sup> the offering for sale or sale, of articles that are falsely represented as traditional cultural expressions/expressions of folklore made by indigenous people,<sup>11</sup> and non-indigenous peoples<sup>12</sup> [which disparages, offends or falsely suggests a connection with the [community] beneficiaries, that may be a nation, a people or an indigenous community or other community,<sup>13</sup> / indigenous peoples and non-indigenous peoples<sup>14</sup> and local<sup>15</sup> communities [and traditional and other cultural communities<sup>16</sup>]<sup>17</sup> concerned, or brings [the community them<sup>18</sup> into contempt or disrepute]<sup>19</sup>;*
- c) *any fixation, representation, publication, communication or use in any form of the traditional cultural expressions/expressions of folklore which make no mention of the community, indigenous peoples and non-indigenous peoples<sup>20</sup> or local<sup>21</sup> communities or region or nation<sup>22</sup> to which they belong<sup>23</sup>/ which is not legitimate and which does not faithfully reflect the region to which these communities belong<sup>24</sup>, except where omission is dictated by the manner of the use.<sup>25</sup><sup>26</sup>*

<sup>1</sup> Corlita Babb-Schaeffer. See note 2

<sup>2</sup> Susanna Chung. See note 3

<sup>3</sup> Delegation of Egypt. See note 35. The Delegation of Morocco concurred

<sup>4</sup> Delegation of Mexico

<sup>5</sup> Delegation of Australia. The provision was preventing the individual indigenous creator from obtaining copyright/related rights and exercising those rights through for example licensing. That had to remain an option to an indigenous artist or author. Consideration had to be given to basic policy objectives on the relationship between the individual rights of an indigenous creator over a work and the rights of a community related thereto

<sup>6</sup> Delegation of Australia. See note 5

<sup>7</sup> Delegation of the United States of America. See note 57

<sup>8</sup> Delegation of Morocco

<sup>9</sup> Delegation of the United States of America. See note 57

<sup>10</sup> Delegation of Australia. The Delegation suggested replacing the phrase “any use of the traditional cultural expressions/expressions of folklore … or [derivatives] adaptations thereof” with “the offering for sale or sale, of articles that are falsely represented as traditional cultural expressions/expressions of folklore made by indigenous people”. The Delegation suggested this alternate wording to specifically cover misappropriation. It said that it would assist further discussion as to whether such acts should be regarded as misappropriation

<sup>11</sup> Delegation of Australia. See note 10

<sup>12</sup> Corlita Babb-Schaeffer. See note 2

<sup>13</sup> Delegation of Morocco. See note 22

<sup>14</sup> Corlita Babb-Schaeffer. See note 2

<sup>15</sup> Susanna Chung. See note 3

<sup>16</sup> Delegation of Mexico

<sup>17</sup> Susanna Chung. See note 3

<sup>18</sup> Delegation of Mexico

<sup>19</sup> Delegation of Venezuela (Bolivarian Republic of). The Delegation said that the rights should be full rights and not be conditional

<sup>20</sup> Corlita Babb-Schaeffer. See note 2

<sup>21</sup> Susanna Chung. See note 3

<sup>22</sup> Delegation of Egypt. See note 35. The Delegation of Morocco concurred

<sup>23</sup> Delegation of Mexico

<sup>24</sup> Delegation of Morocco

<sup>25</sup> Delegation of the United States of America. See note 37

<sup>26</sup> Justin Hughes seconded the proposal by Jens Bammel to delete paragraph 1

**[Other traditional cultural expressions/expressions of folklore]**

2. In respect of the use and exploitation of other traditional cultural expressions/expressions of folklore not registered or notified as referred to in Article 7, [there shall be adequate and effective legal and practical measures to [ensure] guarantee<sup>1</sup>] that / States shall adopt<sup>2</sup>:

- a) the relevant [community is] indigenous peoples and non-indigenous peoples<sup>3</sup> and local<sup>4</sup> communities [and traditional and other cultural communities]<sup>5</sup> or nation<sup>6</sup> are identified as the source or owner<sup>8</sup> of any work or other production adapted from the traditional cultural expression/expression of folklore, except where omission is dictated by the manner of the use<sup>9</sup>;
- b) any distortion, mutilation or other modification of, or other derogatory action in relation to, or misuse<sup>10</sup> a traditional cultural expression/expression of folklore can be prevented or stopped<sup>11</sup> [and/or is subject to [civil or criminal] [criminal or]<sup>12</sup> civil<sup>13</sup> sanctions]<sup>14</sup>;
- c) any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of folklore of [a community] the indigenous peoples and non-indigenous peoples<sup>15</sup> and local<sup>16</sup> communities [and traditional and other cultural communities]<sup>17</sup><sup>18</sup> or nation<sup>19</sup>, suggest any endorsement by or linkage with [that community] [such indigenous peoples and local<sup>20</sup> communities [and traditional and other cultural communities]<sup>21</sup><sup>22</sup>] them<sup>23</sup> can be prevented or stopped<sup>24</sup> and/or is subject to [civil or criminal] [criminal or]<sup>25</sup> civil<sup>26</sup> sanctions; and
- d) **2 OPTIONS**

OPTION A: [where the use or exploitation is for gainful intent,<sup>27</sup> there [should] shall<sup>28</sup> be [equitable remuneration or]<sup>29</sup> benefit-sharing on terms determined by [the

<sup>1</sup> Delegation of Algeria

<sup>2</sup> Benny Müller

<sup>3</sup> Corlita Babb-Schaeffer. See note 2

<sup>4</sup> Susanna Chung. See note 3

<sup>5</sup> Susanna Chung. See note 3

<sup>6</sup> Delegation of Egypt. See note 35. The Delegation of Morocco concurred

<sup>7</sup> Delegation of Mexico

<sup>8</sup> Delegation of Zambia. See note 36

<sup>9</sup> Delegation of the United States of America. See note 94

<sup>10</sup> Luz Celeste Ríos de Davis

<sup>11</sup> Delegation of Algeria. See note 27

<sup>12</sup> Danny Edwards

<sup>13</sup> Delegation of Venezuela (Bolivarian Republic of). The Delegation claimed that once a criminal sanction had been sought, there could not be any civil sanction. The drafting was confusing, since one had to elect between the criminal and civil systems. One had to obtain criminal sanctions before obtaining civil sanctions

<sup>14</sup> Justin Hughes

<sup>15</sup> Corlita Babb-Schaeffer. See note 2

<sup>16</sup> Susanna Chung. See note 3

<sup>17</sup> Delegation of Mexico

<sup>18</sup> Susanna Chung. See note 3

<sup>19</sup> Delegation of Egypt. See note 35. The Delegation of Morocco concurred

<sup>20</sup> Susanna Chung. See note 3

<sup>21</sup> Delegation of Mexico. The Delegation suggested replacing "that community" with "such indigenous peoples and communities and traditional and other cultural communities"

<sup>22</sup> Susanna Chung. See note 3

<sup>23</sup> A delegation proposed substituting the phrase with the pronoun "them"

<sup>24</sup> Delegation of Algeria. See note 27

<sup>25</sup> Danny Edwards

<sup>26</sup> Delegation of Venezuela (Bolivarian Republic of). See note 13

<sup>27</sup> Delegation of Venezuela (Bolivarian Republic of). The use or exploitation could not be subject to any condition. It was obvious that the use or exploitation was in order to make profit, because, as the word "exploitation" was so strong, it implicitly suggested that it was being done for profit. The Delegation of South Africa concurred

<sup>28</sup> Delegation of India. That modification was imperative for the following reasons: (1) there was a need to recognize collective ownership with positive exclusive rights of the communities and not just rights to prohibit; (2) the right to assign these rights by

*Agency] designated [national]<sup>30</sup> authority<sup>31</sup> referred to in Article 4 in consultation with the relevant [community] indigenous people and non-indigenous peoples<sup>32</sup> and local<sup>33</sup> communities [and traditional and other cultural communities<sup>34</sup><sup>35</sup>] or nation<sup>36</sup>; and*

*OPTION B<sup>37</sup>: [where the use or exploitation is for gainful intent,]<sup>38</sup> there [should] shall<sup>39</sup> be [equitable remuneration or]<sup>40</sup> benefit-sharing on terms determined by the relevant [community] indigenous people and non-indigenous peoples<sup>41</sup> and local communities<sup>42</sup> or nation<sup>43</sup>, in consultation with the [Agency] designated [national]<sup>44</sup> authority<sup>45</sup> referred to in Article 4; and]<sup>46</sup>*

***Secret traditional cultural expressions/expressions of folklore***

3. *There shall be / States shall adopt<sup>47</sup> adequate and effective legal and practical measures to ensure that [communities] the indigenous peoples and non-indigenous peoples<sup>48</sup> and local<sup>49</sup> communities [and traditional and other cultural communities<sup>50</sup><sup>51</sup>] or nation<sup>52</sup> have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.<sup>53</sup>*

**Article 3 ALT**

**RIGHTS CONFERRED AND SCOPE OF PROTECTION**

*Adequate and effective legal and practical measures shall be provided to prevent all acts of misappropriation misuses and unlawful exploitation, and to safeguard the exclusive rights of beneficiaries of traditional cultural expressions/expressions of folklore as defined in Article 2 of*

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agreements had to be recognized, and not only based on the principle of free, prior and informed consent, (3) equitable remuneration systems for any type of TCE/EoF were not acceptable, it was the exclusive right of the community; (4) if the use of TCEs/EoF was spread all over a nation or country, and not identified with any specific community, the benefit-sharing had to be based on the decision of the national authority

<sup>29</sup> Delegation of India. See note 28. The Delegations of South Africa and of the United States of America concurred

<sup>30</sup> Delegation of the United States of America. The Delegation said that it was possible that in some circumstances a regional or international authority such as OAPI or ARIPO be chosen by an indigenous or traditional community to be the designated authority

<sup>31</sup> Delegation of Mexico

<sup>32</sup> Corlita Babb-Schaeffer. See note 2

<sup>33</sup> Susanna Chung. See note 3

<sup>34</sup> Delegation of Mexico

<sup>35</sup> Susanna Chung. See note 3

<sup>36</sup> Delegation of Egypt. See note 35. The Delegation of Morocco concurred

<sup>37</sup> Delegation of the United States of America. The emphasis had to be on the indigenous people and community, their desires, and not on the desires of a designated national authority

<sup>38</sup> Delegation of Venezuela (Bolivarian Republic of). The use or exploitation could not be subject to any condition. It was obvious that the use or exploitation was in order to make profit, because, as the word "exploitation" was so strong, it implicitly suggested that it was being done for profit. The Delegation of South Africa concurred

<sup>39</sup> Delegation of India. That modification was imperative for the following reasons: (1) there was a need to recognize collective ownership with positive exclusive rights of the communities and not just rights to prohibit; (2) the right to assign these rights by agreements had to be recognized, and not only based on the principle of free, prior and informed consent, (3) equitable remuneration systems for any type of TCE/EoF were not acceptable, it was the exclusive right of the community; (4) if the use of TCEs/EoF was spread all over a nation or country, and not identified with any specific community, the benefit-sharing had to be based on the decision of the national authority

<sup>40</sup> Delegation of India. See note 28. The Delegations of South Africa and of the United States of America concurred

<sup>41</sup> Corlita Babb-Schaeffer. See note 2

<sup>42</sup> Delegation of Mexico

<sup>43</sup> Delegation of Egypt. See note 92. The Delegation of Morocco concurred

<sup>44</sup> Delegation of the United States of America. See note 30

<sup>45</sup> Delegation of Mexico

<sup>46</sup> Justin Hughes seconded the proposal by Jens Bammel to delete paragraph 2, and to simply keep Article 3(3), because as it was written, the Article posed serious human rights issues, especially concerning the freedom of expression and the freedom to publish. Masahiro Oji agreed. Preston Hardison disagreed. Ndeye Siby suggested moving the paragraph under Article 4

<sup>47</sup> Benny Müller

<sup>48</sup> Corlita Babb-Schaeffer. See note 2

<sup>49</sup> Susanna Chung. See note 3

<sup>50</sup> Delegation of Mexico

<sup>51</sup> Susanna Chung. See note 3

<sup>52</sup> Delegation of Egypt. See note 35. The Delegation of Morocco concurred

<sup>53</sup> Vittorio Ragonesi suggested rephrasing the whole article, as it was unclear

*these provisions, to control, authorize or prohibit and benefit from the use of such traditional cultural expressions/expressions of folklore in the following terms:*

- (a) *traditional cultural expressions/expressions of folklore which have been as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that beneficiaries, that may be a nation, a people or an indigenous community or other community the relevant indigenous people or community, traditional and other cultural community can prevent the following acts from taking place without its free, prior and informed consent:*
- (i) *in respect of such traditional cultural expressions/expressions of folklore other than words, signs, names and symbols:*
- *the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography of the traditional cultural expressions/expressions of folklore or derivatives (adaptation) thereof;*
  - *any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the indigenous peoples and communities and traditional and other cultural communities as the source of the traditional cultural expressions/expressions of folklore;*
  - *any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore, done in order to cause harm thereto or(or any action that may prejudicial to the expressions, that would against or would damage the reputation, customary values or cultural identity or integrity of the community) to the reputation or image of the community, indigenous peoples and communities or region to which they belong; and*
  - *the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof;*
- (ii) *in respect of words, signs, names and symbols which are such traditional cultural expressions/expressions of folklore, any use of the traditional cultural expressions/expressions of folklore or derivatives thereof, or the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or derivatives thereof, which disparages, offends or falsely suggests a connection with the indigenous peoples and communities and traditional and other cultural communities concerned, or brings them into contempt or disrepute;*
- (iii) *any fixation, representation, publication, communication or use in any form of the traditional cultural expressions/expressions of folklore which make no mention of the community, indigenous peoples or communities or region to which they belong except where omission is dictated by the manner of the use;*
- (iv) *any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of folklore of the indigenous peoples and communities and traditional and other cultural communities, suggest any endorsement by or linkage with such indigenous peoples and communities and traditional and other cultural communities, can be prevented and/or is subject to civil or criminal sanctions; and*
- (v) *there should be equitable benefit sharing where the use or exploitation of this knowledge for gainful intent is, there should be benefit-sharing on terms determined by the relevant communities in consultation with the designated*

*national authority referred to in Article 4 designated national authority referred to in Article 4 in consultation with the relevant indigenous people and communities; and*

*Secret traditional cultural expressions/expressions of folklore*

- (b) *There shall be adequate and effective legal and practical measures to ensure that the indigenous peoples and communities and traditional and other cultural communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.<sup>1</sup>*

[Commentary on Article 3 follows]

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<sup>1</sup> Makiese Augusto

## COMMENTARY

### ARTICLE 3: ACTS OF MISAPPROPRIATION AND MISUSE<sup>1</sup> (SCOPE OF PROTECTION)

#### Discussion Overview

Extensive discussion took place among the experts regarding Article 3 as formulated in WIPO/GRTKF/IC/17/4 Prov., which deals with the misuses and misappropriations of TCEs/EoF, the rights, and the remedies that would apply.

The need to formulate a shorter, less complex, less illustrative and less redundant article was repeatedly expressed. Moreover, views were expressed that the title, format and content of the Article needed to be amended in order to reflect the purpose of the Article more accurately.

There was no consensus to either keep or give up the multi-layer approach. (See also, on these aspects, the comments made under Article 7). Several proposals were nonetheless made to slim the text down, e.g., deleting the general objectives or shifting provisions to other articles. Breaking down the article into three new articles was also suggested. Some experts thought that the types of rights, whether moral or economic, had to be more clearly distinguished and defined. A few experts suggested that both categories of rights be dealt within separate articles.

Regarding the title, the reference to “acts of misappropriation” was considered too restrictive or unclear by a few experts. Alternative titles, as reflected in the present record, were therefore proposed by a few of those experts.

Regarding the content of the article, views were expressed that further clarification on the Objectives and Principles and firmer common ground on various general issues regarding protection would help move the discussion forward. The logical link that requested consistency between Article 3 and Articles 1, 2, 5 and 7 was emphasized. What appeared as an inconsistency between subparagraphs 3(1)(a)( i) and 3(1)(a)(ii) and(iii) was brought forward by one expert.

A few experts referred to the “gap analysis” (document WIPO/GRTKF/IC/13/4(b) Rev.) as an important reference text to better define the role that Article 3 could play in filling the gaps in existing protection instruments. While many experts supported the need for *sui generis* provisions for the protection of TCEs/EoF, some experts expressed diverging views regarding the extent to which the envisaged provisions should reflect, incorporate, be inspired by, or be incorporated into existing protection regimes.

In that context, concerns were expressed by some experts that the prevention of acts that were described as illegal in Article 3 could unduly infringe freedom of expression and create imbalances between right holders and third party users, as well as unduly affect the public domain as circumscribed under the copyright system. A few experts supported that view. Other experts, including observers, disagreed and considered that protection of TCEs/EoF against misuse justified that freedom of expression be duly limited regarding their use by third parties, as TCEs/EoF were essential components of the social and cultural identity of the relevant right holders and deserved specific care. A few experts reminded that preservation of the public

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<sup>1</sup> Delegation of Mexico

domain under the copyright system could not be an objective in itself and prevailed on the need to ensure effective protection of TCEs/EoF.

A few experts considered the scope of protection that should respectively apply to TCEs/EoF, on the one hand, and to derivatives and adaptations thereof, on the other hand, as insufficiently addressed. Correlatively, some experts flagged that TCEs/EoF which were derivatives could be protectable under copyright or had rightfully fallen into public domain. Such derivatives needed to be clearly identified as such. In the same line, a few experts flagged that misappropriation of TCEs/EoF and its suppression as envisaged in the title and in subparagraph (1)(a) were too broadly envisaged. They requested more clarity in order to accommodate the respective rights of the communities, on the one side, and of individual creators and performers, on the other, both inside and outside of the customary context.

Many detailed proposals, as reflected in the present record of proposals and comments, were made, sometimes with diverging purposes in mind. While some were intended to restrict the scope of protection, others were meant to extend coverage. Some experts considered that “criminal sanctions” as proposed by Article 3(2)(a) was not foreseen under the copyright system and had to be left out. Others were of the view that prevention of illegal acts under subparagraph (2)(a)(iii) could not be restricted to acts that were intentionally harmful. One expert suggested that states should be bound by “shall” instead of “should” throughout Article 3.

### Comments and Questions by Experts at IWG 1

#### *Terminology*

Larisa Simonova said that Article 3(2)(c), was difficult to read. The place where “indications” was written made it difficult to understand the article.

Margreet Groenenboom wondered what the difference was between “adaptations” and “derivatives”.

#### *Scope of protection*

Benny Müller wondered why modifications of TCEs, in Article 3(2)(b), was not allowed.

Tim Roberts suggested removing the reference to criminal liability.

Debra Harry said that Article 3(1) reflected only one form of defensive protection. There had to be an expansion of that section listing all possible forms of defensive and positive protection, or create another section that treated that issue separately. The right of indigenous peoples’ own systems for protection also needed to be referenced as legitimate and effective forms of protection.

Thiru Balasubramaniam suggested that consideration be given to liability rule approaches that would require remuneration when there was commercialization of a protected expression, without creating an exclusive right, and without providing for remuneration where the expression was used in works that were distributed or performed for free. An additional possibility was to target the remuneration right to only some types of commercial exploitation, such as for uses in motion pictures or recorded music where the work generated more than a minimum amount of revenue. The rationale for making these suggestions was as follows: among the major objections to a *sui generis* IP right for the protection of TCEs were (1) concerns about the impact of such a new right on the freedom to create new works and (2) the potential negative impact of such a right on

non-commercial and free uses of works. By allowing the freedom to use TCEs in cases where there was remuneration for cases where the expressions were already subject to some commercial exploitation, or where the use was associated with the distribution or use of a work for free, there was greater acceptance of such a new *sui generis* regime. In some cases the community identified as an owner or guardian of a TCE could have an interest in controlling or regulating the use of the TCE, independent of the issue of remuneration. Even in these cases, the regulation of uses did not need necessarily to be presented as an IP right. For example, libel or slander were important restrictions of speech that operated wholly independently of IP rights. Other types of moral issues, such as the right of attribution, could be associated with the right of remuneration or even free uses of works.

*Structure of the article*

Justin Hughes suggested breaking Article 3 into three articles.

Paul Kuruk suggested breaking Article 3 into two parts: rights and sanctions.

*Stand-alone article*

Rachel-Claire Okani suggesting having an article detailing the rights and defining the scope of protection, before having an article dealing with misuse and misappropriation. Ndeye Siby concurred.

Natacha Lenaerts suggested having one article dealing with moral rights.

Luz Celeste Ríos de Davis suggested a complete revision of Article 3, as well as of the categorization of misappropriations and misuses, but not only the prohibitions, also the sanctions, in accordance with Article 8. In addition, she gave the example of the “mola”, which was sold at the country’s borders and bore the mention “Made in such a territory” but did not mention the name of the source community (the Kuna). That had created the false idea that the “mola” belonged to the territory in question. She said that she agreed that many issues could be left to national legislation, as in an international instrument such as that, it was not possible to include all forms and procedures. For example, Panama was rigorous in the application of sanctions and for infringements against the collective rights of indigenous peoples. The sanctions were included and categorized in the Penal Code, and referred to a penalty of four to six years’ imprisonment for whoever: “Reproduces, copies or modifies, wholly or partly, a work protected by the collective right of indigenous peoples; stores, distributes, exports, assembles, installs, manufactures, imports, sells, rents or brings into circulation in any other manner an illicit reproduction of a work protected by the collective right of indigenous peoples and misappropriates ownership of a work protected by the collective right of indigenous peoples. A penalty of four to six years’ imprisonment shall be applied to whoever manufactures or assembles, markets or brings into circulation a product protected by the collective right of indigenous peoples and their traditional knowledge, without the consent of the holders of the right and others”. (No. 26519 Official Digital Gazette, Monday April 26, 2010).

*Interests of indigenous peoples*

Xilonen Luna Ruiz said that the protection of TCEs had to stem from the underlying interest of the indigenous community and/or people. They were the ones who had to decide whether the scope of protection could go beyond the limits of internal protection and whether they required other mechanisms for external assistance. The problem of TCEs was that they belonged to a collective, in which the willingness to revitalize, develop and register (recognition of the cultural expression as part of their heritage) had to be based on community consensus.

As the case may be, IP belonged to the indigenous community or people; however, those distinctive cultural features of community identity which made their work distinctive within the culture in question and not recurred in other communities had to be identified. Where appropriate, then, a regional type of protection needed to be considered.

*Free prior and informed consent*

Xilonen Luna Ruiz said that the "free" factor referred to consent not given under duress nor by way of threats; that was why it was employed in various articles of the UN Declaration on the Rights of Indigenous Peoples. As regards copyright, the collective or individual had to agree to comply with the implications of copyright. That required that the existence of TK and the TCEs itself were publicized. More work was needed on the issue of copyright vis-à-vis the cultural rights of indigenous peoples, as they were the custodians of TK and TCEs, using these cultural rights in connection with collective property. For example, Mexico was a country which possessed an ancestral maize crop. Among indigenous peoples, its peoples still had a "healthy" diet thanks to the practice of mixed crop farming (pigweed, beans, squashes, corn, etc.) and to the persistence of many of these in preserving native Mexican maize and other mixed farming crops which were closely linked to an ancestral diet and to their world vision. The process of genetically modifying maize and the emergence of development programs which altered the ancestral activities of indigenous communities, in some cases, had not been subject to free consultations with such communities (such was the case with mines and hydroelectric dams, among others). In such cases, it impacted TK and nature, which were closely interlinked.

Drafting Suggestions by Observers

Lázaro Pary suggested amending Article 3 as follows: the title of Article 3 should read "Acts of misappropriation and misuse/illicit appropriation and use/scope of protection". In paragraph 1, he suggested replacing the word "prevent" by the word "prohibit". Paragraph (a) should read "the prohibition or the ban will be applied to the following unlawful acts which are set forth in this article: the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation, including by still photography of TCEs/EoF without the prior informed consent of the right holders". In paragraph (ii), "any use of the TCEs/EoF or adaptation thereof which does not acknowledge in an appropriate way the indigenous peoples and communities and traditional and other cultural communities or other nations as being the legitimate owners of that cultural heritage". Everything coming after that should be deleted, except subparagraph (iii) "any distortion, mutilation or other modification or other derogative action in relation to TCEs/EoF in order to cause harm thereto or any action, that may be for a tradition to the expressions, expressions that would offend against or damage the reputation, customary values or cultural identity or integrity of the community whoever they may belong". In (iv), "the acquisition by unfair or unconscionable action of IP rights over TCEs/EoF". Turning to paragraph 2(a), it was recognized that indigenous peoples and communities and traditional communities have the right to IP of any tangible and intangible work. That sentence had to be deleted, except (b): any distortion or mutilation or other modification of TCEs the authors of which have committed those crimes will be sanctioned criminally and in severe terms. In (c), equally, sanctions criminal will be applied to any false confusion or misleading indications or allegations with the intention of using TCEs for the trade in goods and services without the free prior and informed consent of the right holders.

He proposed the following:

"ACTS OF MISAPPROPRIATION (Delete "misuse" and replace "*indebida*" with "*ilícita*" in the Spanish version.)<sup>1</sup>

Because of their general and declarative nature and given that they are neither legal provisions nor binding standards on the protection of traditional cultural expressions, it is recommended to transfer and include the five (5) paragraphs in the chapter on the general principles and objectives of the present instrument.

In relation to paragraph 1 concerning the requirement to adopt adequate and effective legal measures and mechanisms to prohibit (instead of "prevent") the misappropriation by fraudulent means of the traditional cultural expressions of indigenous peoples or traditional communities, without their free, prior and informed consent:

- (a) The prohibition shall apply to the following illicit acts stipulated in the present Article:
  - (i) the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available in the *public domain*, including fixation by still photography, of traditional cultural expressions/expressions of folklore without the free, prior and informed consent of their holders;
  - (ii) any use of traditional cultural expressions/expressions of folklore or adaptation thereof to the detriment of the interests of the indigenous peoples or traditional communities which are the legitimate owners of this cultural heritage (delete "except...");
  - (iii) any distortion, mutilation or modification, or derogatory action and acts in bad faith, intended to damage, offend against or cause harm to the reputation of the community or to the cultural identity and integrity of indigenous peoples or traditional communities regardless of the region in which they live; and
  - (iv) any acquisition by fraudulent means or through the use of violence of intellectual property rights over traditional cultural expressions/expressions of folklore.

## Paragraph 2

- (a) The intellectual property rights of indigenous peoples and traditional communities over any tangible and intangible works shall be recognized (delete "except...");
- (b) Any distortion, mutilation or other modification of traditional cultural expressions is prohibited and anyone who commits such acts shall be liable to civil and criminal sanctions;
- (c) Any false, confusing or misleading indications or allegations aimed at using traditional cultural expressions as a reference in relation to trade in goods or services, without the free, prior and informed consent of their holders, shall be subject to civil and criminal sanctions."

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<sup>1</sup> Note from the Secretariat: the change proposed to Spanish version does not affect the English version

Miguel Pérez Solís disagreed with the expression “misappropriation” because there needed to be a link, a relationship of dependence and business, with the person committing the crime. It could be, for example, a member of an indigenous community without the authorization of that community, communicating, reproducing, any type of action, without having received consent. Article 3's title had to be changed to “Infringements and Misuse”. In paragraph (1), on the second to last line, which ended with “indigenous people or traditional and other cultural community can”, “authorize with their free prior and informed consent the following acts” had to be added. He also suggested deleting “other than word signs, names and symbols”. He suggested adding a separate section in order to have the ability of preventing the following acts, those that appear in subparagraph (ii). He suggested deleting the last part of subparagraph (iii). As concerned the two options, he said he favored option (b).

## ARTICLE 4:

## MANAGEMENT OF RIGHTS

1. *[Prior authorizations]<sup>1</sup> substantial consent<sup>2</sup> [Prior informed consent<sup>3</sup>] [to use] to do acts within the rights of indigenous peoples and non-indigenous peoples<sup>4</sup> in<sup>5</sup> the traditional cultural expressions/expressions of folklore, when required in these provisions, should be obtained either directly from the state, national, indigenous people<sup>6</sup> and non-indigenous peoples<sup>7</sup> [community concerned where the community so wishes] and local<sup>8</sup> communities and each of the groups<sup>9</sup>, [families]<sup>10</sup>, tribes, nations, traditional [and other cultural communities or countries]<sup>11</sup><sup>12</sup>, or [from] via<sup>13</sup> [an agency] a designated [national]<sup>14</sup> authority<sup>15</sup> acting at the request, and on behalf, of the [community (from now on referred to as "the Agency")] indigenous people and non-indigenous peoples<sup>16</sup> and local<sup>17</sup> community or the traditional and other cultural communities or the nations<sup>18</sup>. Where authorizations are granted by the [Agency] authority<sup>19</sup>:*
- (a) *such authorizations should be granted only in appropriate consultation with the relevant indigenous people and non-indigenous peoples<sup>20</sup> and<sup>21</sup> local<sup>22</sup> community [and traditional and other cultural communities]<sup>23</sup><sup>24</sup>, in accordance with their traditional decision-making and governance processes;*
  - (b) *any monetary or non-monetary benefits collected by the [Agency] designated [national]<sup>25</sup> authority<sup>26</sup> for the use of the traditional cultural expressions/expressions of folklore should be [provided directly] facilitated<sup>27</sup> by it to the indigenous people and non-indigenous peoples<sup>28</sup> and<sup>29</sup> local<sup>30</sup> community [and the traditional and*

<sup>1</sup> Vittorio Ragonesi<sup>2</sup> Miranda Risang Ayu<sup>3</sup> Susanna Chung<sup>4</sup> Corlita Babb-Schaeffer. See note 2<sup>5</sup> Delegation of Australia. Clear and settled definitions of rights holders were needed. The first line of Article 4, subparagraph (a), dealt with the use of TCEs which appeared to mix both individual property rights and possible new collective rights. That raised important issues which required further discussion and clarification. In particular, the rights of individual indigenous authors to control the exercise of their property rights in their own creations could not be extinguished without careful consideration. Also, in some countries, including Australia, there were already collective management arrangements that allowed for the use of individual copyright for particular public purposes such as education or teaching purposes. Interference with such arrangements could not be done lightly. It suggested the change in order to make clear that the management of rights was the management of collective peoples' rights, but not the management of individual creators' rights<sup>6</sup> Makiese Augusto<sup>7</sup> Corlita Babb-Schaeffer. See note 2<sup>8</sup> Susanna Chung. See note 3<sup>9</sup> Makiese Augusto<sup>10</sup> Margreet Groenenboom. See note 262<sup>11</sup> Delegation of Mexico.<sup>12</sup> Susanna Chung. See note 3<sup>13</sup> Susanna Chung<sup>14</sup> Delegation of the United States of America. See note 30<sup>15</sup> Delegation of Mexico<sup>16</sup> Corlita Babb-Schaeffer. See note 2<sup>17</sup> Susanna Chung. See note 3<sup>18</sup> Delegation of Mexico<sup>19</sup> Delegation of Mexico<sup>20</sup> Corlita Babb-Schaeffer. See note 2<sup>21</sup> Delegation of Mexico<sup>22</sup> Susanna Chung. See note 3<sup>23</sup> Delegation of Mexico<sup>24</sup> Susanna Chung. See note 3<sup>25</sup> Delegation of the United States of America. See note 30<sup>26</sup> Delegation of Mexico<sup>27</sup> Susanna Chung<sup>28</sup> Corlita Babb-Schaeffer. See note 2<sup>29</sup> Delegation of Mexico<sup>30</sup> Susanna Chung. See note 3

other cultural communities<sup>1</sup><sup>2</sup> concerned or contribute to the safeguarding and to the preservation of the traditional cultural expressions.<sup>3</sup>

2. Where so requested by an indigenous people or non-indigenous people<sup>4</sup> or local<sup>5</sup> community [and traditional and other cultural communities,<sup>6</sup><sup>7</sup> the [Agency] designated [national]<sup>8</sup> authority<sup>9</sup> should generally be tasked with awareness-raising, capacity-building and development<sup>10</sup>, education, advice and guidance functions. The [Agency] designated [national]<sup>11</sup> authority<sup>12</sup> should also:
  - (a) [where so requested by an indigenous people or non-indigenous people<sup>13</sup> and local<sup>14</sup> community [and traditional and other cultural communities,<sup>16</sup>]<sup>17</sup>] monitor uses of traditional cultural expressions/expressions of folklore for purposes of ensuring fair and appropriate use as provided for in Article 3 (2); and,
  - (b) establish the [equitable remuneration]<sup>18</sup> referred to in Article 3 (2) in consultation with the relevant [community] indigenous peoples and non-indigenous peoples<sup>19</sup> and local<sup>20</sup> communities [and traditional and other cultural communities<sup>21</sup>]<sup>22</sup>.

Article 4 ALT: Member States shall set up an appropriate mechanism to efficiently and effectively manage rights of the holders of traditional cultural expressions in proper consultation with such holders.<sup>23</sup>

[Commentary on Article 4 follows]

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<sup>1</sup> Delegation of Mexico

<sup>2</sup> Susanna Chung. See note 3

<sup>3</sup> Nadia Mokrani

<sup>4</sup> Corlita Babb-Schaeffer. See note 2

<sup>5</sup> Susanna Chung. See note 3

<sup>6</sup> Delegation of the United States of America. The Delegation suggested starting the article with the phrase “where so requested by an indigenous people and community and traditional and other cultural communities”, stating that there was no reason why the entire paragraph should not be conditioned on the request of the indigenous people or the community. Indeed, the indigenous people or community could prefer in the case of secret TCEs that the designated authority not engage in awareness-raising

<sup>7</sup> Susanna Chung. See note 3

<sup>8</sup> Delegation of the United States. See note 30

<sup>9</sup> Delegation of Mexico

<sup>10</sup> Susanna Chung

<sup>11</sup> Delegation of the United States. See note 30

<sup>12</sup> Delegation of Mexico

<sup>13</sup> Corlita Babb-Schaeffer. See note 2

<sup>14</sup> Delegation of Mexico

<sup>15</sup> Susanna Chung. See note 3

<sup>16</sup> Delegation of Mexico

<sup>17</sup> Delegation of the United States. See note 6

<sup>18</sup> Anne Le Morvan

<sup>19</sup> Corlita Babb-Schaeffer. See note 2

<sup>20</sup> Susanna Chung. See note 3

<sup>21</sup> Delegation of Mexico

<sup>22</sup> Susanna Chung. See note 3

<sup>23</sup> Weerawit Weeraworawit

## COMMENTARY

### ARTICLE 4: MANAGEMENT OF RIGHTS

#### Discussion Overview

Extensive discussion took place on Article 4, dealing with the management of rights, as stated in WIPO/GRTKF/IC/17/4 Prov.

The views expressed under Article 3 relating to the scope of protection were echoed by experts addressing Article 4. Most experts argued that the scope of protection clearly had a bearing on the management of rights and that Article 4 could not be envisaged as a stand-alone article. Some experts said that it was necessary to clarify first what was the scope of such rights before any fruitful discussion on how they would be managed could be conducted. Parts of the text were put between brackets for that reason.

Other experts, including observers, expressed support for the article as consistent with Article 3. Several of those experts, including observers, made proposals in order to add to the present article more precision or to amend its orientation or to make it more binding. Those proposals are reflected in the present record.

Questions were raised regarding the entity that would be competent for the management of rights. While most experts pleaded for the need to have a distinct body designated by each country in order to assume that role on behalf of the right holders, some indigenous experts insisted that the rights be directly managed by the relevant rights holders as an alternate option, possibly with the support of the States if so requested by the rights holders.

One observing expert proposed that the rights be managed by an international authority, arguing that only an international authority would be appropriated to deal with the rights of indigenous peoples and cross-boundary or shared TCEs/EoF.

An alternative proposal was made to the effect of leaving the management mechanism to be dealt with by each State on a broader basis than in the present article.

Further questions were raised on how the designated Authority (the “Agency”) would interact with rights holders, particularly in relation to subparagraph (1)(a) that dealt with authorizing third parties to use protected TCEs/EoF. Experts considered that the Agency should act in consultation with the right holders, as it was presently contemplated. Some observing experts counter-argued and suggested that the management mechanism be consistent with other relevant international instruments, and particularly the 2007 UN Declaration on the Rights of the Indigenous Peoples, and those authorizations by the Agency should, therefore, be subject to the prior informed consent of the right holders. One alternative proposal was to replace the terms “prior authorizations” by “prior informed consent” in the chapeau of paragraph (1).

Experts also discussed the modalities for the distribution of benefits to rights holders under subparagraph (1)(b). One proposal consisted in using the benefits as a contribution to the preservation of TCEs/EoF. The establishment of registries and documentary records of TCEs/EoF by the national competent authority was commented upon. Some experts emphasized the need for transparency regarding the whole management process, in particular the way in which benefits would be computed and distributed. One observing expert made a proposal in that regard.

Comments and Questions by Experts at IWG 1

N/A

Drafting Suggestions by Observers

Ronald Barnes said that “consultation” should be replaced by “consent”, because consultation for many national institutions or for states simply meant expressing views. Marcus Goffe agreed, but added that alternatively, the text could read “full and effective consultations”. He also suggested adding “international” to replace “national” authority.

Marcus Goffe suggested that “prior authorization” be replaced with “prior informed consent”.

Debra Harry suggested adding, in Article 4(1)(a) after “such authorization”, the phrase “and prior informed consent” and replacing “with” with “by”. She also suggested that the article contain a specific provision recognizing the right of indigenous peoples to establish mechanisms to excise these rights.

Thiru Balasubramaniam suggested adding one paragraph to Article 4, which would read: “The management of the financial aspects of the rights should be subject to transparency concerning the sources and amounts of money collected, the expenditures, if any, to administer the rights and the distribution of money to beneficiaries”.

Lázaro Pary proposed the following for Article 4:

“Article 4: Application of rights

Prior authorizations to use traditional cultural expressions/expressions of folklore shall be obtained in accordance with the provisions of this instrument, directly from the indigenous peoples and communities (...) or from a national authority designated by the indigenous peoples and communities themselves”.

Robert Leslie Malezer suggested the following for Article 4:

“1. Prior authorizations [to use] to do acts within the rights of indigenous peoples in the traditional cultural expressions/expressions of folklore, when required in these provisions, should be obtained either directly from the indigenous peoples or relevant local communities, or from [their designated authority]. Where authorizations are granted by the [Agency] authority:

- (a) such authorizations should be granted only in accordance with the prior, informed consent of the indigenous peoples or local communities, utilizing their traditional decision-making and governance processes;
- (b) any monetary or non-monetary benefits collected by the [Agency] designated [national] authority for the use of the traditional cultural expressions/expressions of folklore should be provided directly by it to the indigenous peoples or in a procedure authorized by the indigenous peoples and community and the traditional and other cultural communities concerned.

2. Where so requested by an indigenous people and community and traditional and other cultural communities, any [ ] designated [ ] authority may be tasked with awareness-raising, education, advice and guidance functions. The [ ] designated [ ] authority should also:

- (a) [where so requested by indigenous peoples and community and traditional and other cultural communities,] have adequate capacity to monitor uses of traditional cultural expressions/expressions of folklore for purposes of ensuring fair and

- appropriate use); and,
- (b) identify the equitable remuneration for guidance to the relevant [community] indigenous peoples and local communities”.

## ARTICLE 5:

## EXCEPTIONS AND LIMITATIONS

1. *Measures for the protection of traditional cultural expressions/expressions of folklore [should] shall<sup>1</sup>:*

- a) *not restrict or hinder the normal creation<sup>2</sup>, use, transmission, exchange and development of traditional cultural expressions/expressions of folklore within the traditional and customary context by members of the [relevant community] indigenous peoples and non-indigenous peoples<sup>3</sup> and local<sup>4</sup> communities [and traditional and other cultural communities]<sup>5</sup><sup>6</sup> as determined by customary laws and practices;*
- b) *extend only to utilizations of traditional cultural expressions/expressions of folklore taking place outside the traditional or customary context, whether or not for commercial gain; and,*
- c) *not apply to utilizations of traditional cultural expressions/expressions of folklore [that would fall under an exception of copyright law, if the traditional cultural expressions/expressions of folklore were protected by copyright law] [in the following cases:*
  - i. *by way of illustration for teaching and learning;*
  - ii. *non-commercial research or private study;*
  - iii. *quotation<sup>8</sup>, objective<sup>9</sup> criticism or review;*
  - iv. *reporting news or current events;*
  - v. *use in the course of legal proceedings;*
  - vi. *the making of recordings and other reproductions of traditional cultural expressions/expressions of folklore for purposes of their inclusion in an archive, [or]<sup>10</sup> inventory or dissemination<sup>11</sup> for non-commercial [cultural heritage safeguarding]<sup>12</sup> purposes; and*
  - vii. *incidental uses,*
  - viii. *the broadcasting and dissemination of the recordings referred to in subparagraph (vi) for the purpose of preserving indigenous languages.<sup>13</sup>*
  - ix. *private and non-commercial purposes<sup>14</sup> and use<sup>15</sup>*
  - x. *visually impaired people<sup>16</sup>*
  - xi. *photographs for private use<sup>17</sup>*
  - xii. *[parody]<sup>18</sup><sup>19</sup>*
  - xiii. *[borrowing of traditional cultural expressions/expressions of folklore for creating an original work of an author or authors]<sup>20</sup><sup>21</sup>*

<sup>1</sup> Benny Müller, Anne Le Morvan and Johan Axhamn disagreed

<sup>2</sup> Benny Müller, Antonia Ortega concurred. This proposal was originally put forward by Tomas Alarcón

<sup>3</sup> Corlita Babb-Schaeffer. See note 2

<sup>4</sup> Susanna Chung. See note 3

<sup>5</sup> Delegation of Mexico

<sup>6</sup> Susanna Chung. See note 3

<sup>7</sup> Justin Hughes, Danny Edwards agreed. Youssef Ben Brahim, Xilonen Luna Ruiz and Ndeye Siby disagreed

<sup>8</sup> Makiese Augusto

<sup>9</sup> Sa'ad Twaissi

<sup>10</sup> Xilonen Luna Ruiz

<sup>11</sup> Xilonen Luna Ruiz

<sup>12</sup> Xilonen Luna Ruiz

<sup>13</sup> Antonia Ortega

<sup>14</sup> Makiese Augusto

<sup>15</sup> Margreet Groenenboom, Johan Axhamn agreed

<sup>16</sup> Danny Edwards. Margreet Groenenboom and Alfredo José Scafati agreed

<sup>17</sup> Danny Edwards

<sup>18</sup> Margreet Groenenboom, Johan Axhamn agreed

<sup>19</sup> Weerawit Weeraworawit

*provided in each case that such uses are compatible with fair practice, the relevant [community is] indigenous peoples and non-indigenous peoples<sup>22</sup> and local<sup>23</sup> communities [and traditional and other cultural communities] are<sup>24</sup> acknowledged as the source of the traditional cultural expressions/expressions of folklore where practicable and possible, and such uses would not be offensive to [the relevant community] such indigenous peoples and communities and traditional and other cultural communities, [as long as the traditional cultural expressions/expressions of folklore are not distorted, mutilated or modified so as to cause harm thereto or to the reputation of the community, indigenous peoples and non-indigenous peoples<sup>26</sup> and communities or region to which they belong.]<sup>27</sup><sup>28</sup>*

2. *It shall be a matter of national legislation to permit the utilization of protected traditional cultural expressions/expressions of folklore in certain special cases, provided that such utilization does not conflict with the normal utilization of the traditional cultural expressions/expressions of folklore by the relevant indigenous people or local community and does not unreasonably prejudice the legitimate interests of that indigenous people or local community.*<sup>29</sup>
3. *Measures for the protection of traditional cultural expressions/expressions of folklore could allow, in accordance with custom and traditional practice, unrestricted use of the traditional cultural expressions/expressions of folklore, or certain of them so specified, by all members of a community, including all nationals of a country in the traditional context.*<sup>30</sup>
4. *Secret traditional cultural expressions/expressions of folklore should be exempted from the exceptions.*<sup>31</sup>

#### Article 5 ALT

*Any normal use of traditional cultural expressions/expressions of folklore shall be allowed, unless such act is exploitative and in conflict with the dignity and value of the right holders of the traditional cultural expressions/expressions of folklore.*<sup>32</sup>

[Commentary on Article 5 follows]

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<sup>20</sup> Johan Axhamn

<sup>21</sup> Youssef Ben Brahim

<sup>22</sup> Corlita Babb-Schaeffer. See note 2

<sup>23</sup> Susanna Chung. See note 3

<sup>24</sup> Susanna Chung. See note 3

<sup>25</sup> Delegation of Mexico

<sup>26</sup> Corlita Babb-Schaeffer. See note 2

<sup>27</sup> Delegation of Mexico

<sup>28</sup> Justin Hughes. See note 7

<sup>29</sup> Justin Hughes

<sup>30</sup> Anne Le Morvan

<sup>31</sup> Heng Gee Lim

<sup>32</sup> Weerawit Weeraworawit

## COMMENTARY

### ARTICLE 5: EXCEPTIONS AND LIMITATIONS

#### Discussion Overview

Experts considered Article 5 as contained in WIPO/GRTKF/IC/17/4 Prov. Those who spoke shared a common view regarding the need to ensure that the envisaged measures for protection of TCEs/EoF be granted in such a way that the public interest be properly safeguarded and that communities stay free to keep using and developing their own TCEs/EoF in a traditional context. Limitations and exceptions needed, therefore, to be contemplated.

Experts were nevertheless divided into two groups regarding the appropriateness of listing the exceptions in detail.

Some experts considered that Article 5 had to focus on general principles and leave the details to be dealt with at the national level. A proposal was made to replace Article 5 with phrasing that would allow normal use of TCEs/EoF “unless it is exploitative and in conflict with the dignity and values of the right holders of TCEs/EoF”. Alternatively, a new paragraph (3) was proposed in order to allow national authorities to permit the utilization of protected TCEs/EoF “in certain special cases [...]”.

Other experts were of the view that a detailed list was necessary in order to ensure legal certainty at the international level. But those experts disagreed on the content and formulation of those exceptions.

Some experts wished to keep the list as envisaged in WIPO/GRTKF/IC/17/4 Prov. with a few or without changes, with a view to meeting the particular characteristics of TCEs/EoF and positively describe what would constitute fair use of TCEs/EoF. One observing expert emphasized the need to restrict those exceptions in accordance with the specific values attached to TCEs/EoF.

Other experts were rather of the view that the list of exceptions should reflect the balance achieved under the copyright regime between right holders and the public interest. They consequently argued that the list of exceptions had to reflect the past and evolutive content of the exceptions that were or would be part of the regime. A few experts suggested that parody should be listed as an exception, as well as “borrowing of TCEs/EoF for creating an original work of an author or authors”. A few other experts, including some observers, disagreed on those two specific proposals. Two experts proposed to restrict copyright-like exceptions to the specific cases of TCEs/EoF which could be protected by copyright law.

A few experts expressed the need to explicitly stipulate that secret TCEs/EoF should not be submitted to any kind of exception.

Regarding the limitation envisaged in subparagraph (1)(a), a few experts suggested to extend its scope by including the “normal creation” of TCEs/EoF in a traditional context as permissible. Two experts expressed concerns that subparagraph (1)(a) could allow discriminatory treatment between nationals and non-nationals in its implementation, should the reference to “the use in a traditional context” not be sufficiently underscored. Similar concerns were expressed regarding paragraph (2).

### Comments and Questions by Experts at IWG 1

Vittorio Ragonesi said that there was a risk of discriminatory treatment between national and non-nationals in the application of the exceptions. Anne Le Morvan underlined the same concern.

Antonia Ortega said that, under subparagraph (1)(a), protection measures could not restrict the use, transmission, creation, etc. of TCEs within the traditional and customary context, as determined by customary laws and practices. She thus wondered what would happen if an indigenous community managed its TCEs directly, particularly those that were tangible. For example, in Peru, indigenous communities were encouraged to exploit some of their expressions directly, such as their craftwork. She asked whether that practice could be regarded as being within the traditional context.

Marcus Goffe was concerned with the exception of “parody,” as it risked giving rise to disrespectful uses. He also expressed concern with respect to the “borrowing”, the “private and non-commercial purposes” and the “photographs for private uses” exceptions. He said Article 5 had to refer to prior informed consent.

### Drafting Suggestions by Observers

Miguel Pérez Solís wished a reference in subparagraph 1(g) on “Incidental Uses” to the three-step approach.

Paul Kuruk disagreed with the proposal by Justin Hughes. He also said that with the exception of Article 5(1)(c), all the other parts of the article dealt with rights to TCEs but not the limitations to such rights. Therefore, those provisions did not belong in Article 5. Clearly, they belonged more appropriately to a different article that sought to identify the rights of indigenous people and other communities in TCEs. He therefore proposed that Article 5(1)(a)-(b); and Article 5(2) be removed from Article 5 and inserted in Article 3, to be devoted exclusively to the scope of rights to be protected under the instrument on TCEs. He also suggested phrasing Article 5 as follows:

- “1. Subject to the provisions of paragraph 2 of this Article, uses of TCEs that are compatible with fair practice, including, but not limited to private, non-commercial, pedagogical and incidental uses, and uses related to news reporting, criticism and archiving, are expressly permitted as authorized exceptions to the rights of indigenous peoples, or owners and holders of TCEs provided for in Article [3].
2. For each use of TCEs that qualifies as a permitted use under paragraph 5(1), the user must ensure that such use respects the rights of the relevant indigenous peoples, or owners and holders of TCEs (i) through an appropriate acknowledgement of the relevant indigenous peoples, or owners and holders of TCEs where practicable and possible, and (ii) by not subjecting the TCEs to derogatory treatment prohibited in Article [X]”.

Jens Bammel proposed a new exception, which read: “Measures for the protection of TCEs/EoF should not apply in the case of Article 3(1) and (2), where a work attracts or interferes with the copyright, trademark or other lawfully obtained IP right of a rights holder. Measures for the protection of TCEs/EoF should not apply in the case of Article 3(3) in the case of informed consent.”

Thiru Balasubramaniam, with respect to Article 5 1(c), (c), (b), suggested that instead of it reading “non commercial research or private study” it read “non commercial uses”. He also proposed an alternative (f) to read, “uses where the revenues for the use are less than the annual (or monthly) income of a resident”.

Debra Harry and Tim Roberts were of the view that there should be no exceptions with respect to secret TCEs. He suggested a new paragraph which would read: “The exceptions listed in paragraph 1 do not apply to secret TCEs within the scope of Article 3(3)”.

## ARTICLE 6:

## TERM OF PROTECTION

*Protection of traditional cultural expressions/expressions of folklore shall last indefinitely and<sup>1</sup> [should] shall<sup>2</sup> endure for as long as the traditional cultural expressions/expressions of folklore continue to meet the criteria for protection under Article 1 of these provisions, and,*

- (a) *[in so far as traditional cultural expressions/expressions of folklore referred to in Article 3(1) are concerned, their protection under that sub-article shall endure for so long as they remain maintained within the community or<sup>3</sup> registered or notified as referred to in Article 7; [and]<sup>4</sup> ]<sup>5</sup>*
- (c) *[the protection granted to traditional cultural expressions/expressions of folklore against any distortion, mutilation or other modification or infringement thereof, [done with the aim of causing harm thereto or to the reputation or image of the community, indigenous peoples and non-indigenous peoples<sup>6</sup> and communities or region to which they belong]<sup>7</sup>. shall last indefinitely.<sup>8</sup><sup>9</sup>]*
- (b) *[in so far as secret and sacred<sup>10</sup> traditional cultural expressions/expressions of folklore are concerned, their protection as such shall endure for so long as they remain secret; and]<sup>11</sup><sup>12</sup> Such traditional cultural expressions/expressions of folklore shall be deemed to remain secret if the element of secrecy is lost through unauthorized disclosure.<sup>13</sup>*

*[At least<sup>14</sup> as regard the economic aspects of traditional cultural expressions/expressions of folklore, their protection should be limited in time.<sup>15</sup>]*

Article 6 ALT: Protection shall be indefinite.<sup>16</sup>

[Commentary on Article 6 follows]

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<sup>1</sup> Luz Celeste Ríos de Davis. Cliffor Guimarães, Mohamed El Mhamdi, Abbas Bagherpour Ardekani and Miranda Risang Ayu concurred

<sup>2</sup> Makiese Augusto. Issah Mahama, Rachel-Claire Okani, Amadou Tankoano, Shafiu Adamu Yauri and Luz Celeste Ríos de Davis agreed

<sup>3</sup> Mirande Risang Ayu

<sup>4</sup> Delegation of Mexico

<sup>5</sup> Susanna Chung. Makiese Augusto. Issah Mahama, Rachel-Claire Okani, Amadou Tankoano, and Shafiu Adamu Yauri agreed

<sup>6</sup> Corlita Babb-Schaeffer. See note 2

<sup>7</sup> Youssef Ben Brahim. Nativ Isayev agreed

<sup>8</sup> Delegation of Mexico

<sup>9</sup> Ahmed Morsi. Justin Hughes concurred

<sup>10</sup> Charity Mwape Salasini

<sup>11</sup> Delegation of Mexico

<sup>12</sup> Susanna Chung

<sup>13</sup> Heng Gee Lim. Makiese Augusto, Issah Mahama, Rachel-Claire Okani, Amadou Tankoano and Shafiu Adamu Yauri agreed.

<sup>14</sup> Johan Axhamn

<sup>15</sup> Natacha Lenaerts. Anne Le Morvan, Pavel Zeman and Johan Axhamn concurred. Vittorio Ragonesi also agreed and made the point that the term in the document would be a minimum, and states could provide a longer term if desired

<sup>16</sup> Meenakshi Negi. Kamala Ratnaseeli Balachandra, Nativ Isayev, Shafiu Adamu Yauri and Susanna Chung concurred

## COMMENTARY

### ARTICLE 6: TERM OF PROTECTION

#### Discussion Overview

Experts considered Article 6, dealing with the term of protection, as formulated in document WIPO/GRTKF/IC/17/4 Prov.

None of the experts explicitly opposed the principle that moral rights protection of TCEs/EoF should last indefinitely as reflected in paragraph (c). One expert proposed a formulation of paragraph (c) to extend its scope to TCEs/EoF of disappeared communities. A few other experts disagreed, while another suggested that the issue be left to national legislation. Two experts disagreed that the protection should be limited to prevent acts that were done with the intention or aim of causing harm.

As far as the term of protection of economic rights as reflected was concerned, experts were divided into two groups. Many experts concurred that protection should last indefinitely as long as the protected TCEs/EoF met the eligibility criteria. A few experts joined in support of two alternative proposals which would simplify the text in this regard.

Some other experts instead were of the view that the term of protection for economic rights had to be limited in time. One proposal was made in order to simplify the article, while another expert suggested that the limitation in time be formulated as a minimum. A few experts argued that the term of economic protection of TCEs/EoF should reflect the terms that are applicable to geographical indications or/and trademarks, but no consensus could be reached on that.

Regarding the term of protection of secret TCEs/EoF as formulated in paragraph (b), one expert highlighted that it sounded illogical to ensure protection of secret TCEs/EoF against unauthorized disclosure as long as they remained secret. One expert suggested adding a phrase that was meant to solve that contradiction.

#### Comments and Questions by Experts at IWG 1

Heng Gee Lim suggested keeping the three-layer system in Article 6. He suggested inverting paragraphs (b) and (c) to mirror the lay-out of Article 3. He raised an issue with regard to paragraph (b): secret TCEs would have indefinite protection as long as they remained secret, but there was nothing dealing with what happens if there was deliberate unauthorized disclosure. Did that mean that the secret was no longer protected at all? He proposed adding: "such TCE shall remain and deem to remain secret if the element of secrecy is lost through unauthorized disclosure", in order to protect against deliberate disclosure. He also wondered how TCEs which would cease to be registered would be protected. He also suggested having a term of protection of life of the TCE plus 50 years after it has died.

Luz Celeste Ríos de Davis said that although she appreciated the general text of Article 6, it was repetitive where it referred to TCEs/EoF. She was concerned with subparagraph (a), as the reference to TCEs/EoF mentioned in Article 3(1) was confusing; also, there was a reference to Article 7, as for TCEs/EoF to remain protected, the link with traditionalism had to be maintained and TCEs/EoF needed to continue to be used by the community. For example, that was not what was done because the raw material used had been depleted in a specific case or because

the collective right had changed into another type of arrangement. As regards subparagraph (b), secret TCEs/EoF could be clarified, however it was known that in any IP right was vital. To be secret the measures that comply with that characteristic needed to be taken, and for that, sufficient means or systems had to be adopted to maintain the confidentiality and restricted access. That had to be underlined, as they did not appear in the field of protection precisely because they were not recorded. Mechanisms had to be established to preserve that confidentiality. Subparagraph (c) was a special case and national legislation was capable of dealing with that, as the term of protection in general would remain reflected in the Article.

Nemon Mukumov, in a written statement, said that matters relating to the term of protection were very important, since all IP subject matter had a specific term of protection. In order to determine the term of protection of folklore, great significance had to be attached to the date of its reproduction. For that purpose, it was appropriate to use the provisions of the Berne Convention, relating to the term of copyright.

#### Drafting Suggestions by Observers

Thiru Balasubramaniam suggested that the liability for and enforcement of the rights be linked to registration formalities. This would reduce the risks associated with infringement of the *sui generis* regime. Moreover, the registration of the rights also made it feasible to set limits on the terms of economic rights.

Lázaro Pary suggested the following wording for Article 6:

"The protection granted by this instrument to TCEs/EoF shall cover the life of the indigenous peoples or traditional communities, stipulated in Article 1.

- (a) The protection of TCEs/EoF shall cover the life of their holders and during the period that this cultural heritage has not been available in the public domain.
- (b) The protection of TCEs/EoF classified as secret, spiritual or sacred shall endure for as long as living memory.
- (c) The protection granted to TCEs/EoF against any distortion, mutilation or modification done with the aim of completely or partly destroying the memory, history and image of the indigenous peoples and communities within the place and time in which they live, shall last indefinitely."

Tim Roberts said that if Article 6(c) was to remain, with deletion of the words "... done with the aim of causing harm..." more words needed to be deleted to make sense. He proposed: "(c) the protection granted to TCEs/EoF against any distortion, mutilation or other modification or infringement thereof, [done with the aim of causing harm thereto or to the reputation or image of the community, indigenous peoples and communities or region to which they belong,] shall last indefinitely".

## ARTICLE 7:

## FORMALITIES

The protection of traditional cultural expressions/expressions of folklore shall not require any formality.<sup>1</sup>

In the interests of transparency, certainty and the conservation of expressions/expressions of folklore, relevant national authorities may maintain registers or other records of traditional cultural expressions/expressions of folklore, where appropriate [and subject to relevant policies, laws and procedures, and the needs and aspirations of expressions/expressions of folklore holders.]<sup>23</sup>

1. As a general principle, the protection of traditional cultural expressions/expressions of folklore should not be subject to any formality. [Traditional cultural expressions/expressions of folklore as referred to in Article 1 are protected from the moment of their creation.]<sup>4</sup>
2. Measures for the protection of specific traditional cultural expressions/expressions of folklore [of particular cultural or spiritual value or significance and for which a level of protection is sought]<sup>5</sup> as provided for in Article 3(1) [should] [shall]<sup>6</sup> require that such traditional cultural expressions/expressions of folklore be notified to or registered with a [competent office or organization] designated [national]<sup>7</sup> authority<sup>8</sup> by the relevant [community or] indigenous people and non-indigenous peoples<sup>9</sup> and community [and traditional and other cultural communities]<sup>10</sup><sup>11</sup>, by the [Agency referred to in Article 4] designated [national]<sup>12</sup> authority or by a third party<sup>13</sup> acting at the request of and on behalf of the community.
  - (a) To the extent that such registration or notification may involve the recording or other fixation of the traditional cultural expressions/expressions of folklore concerned, any intellectual property rights in such recording or fixation [should] [shall]<sup>14</sup> vest in or be assigned to the relevant [community] indigenous peoples and non-indigenous peoples<sup>15</sup> and communities [or traditional and other cultural communities]<sup>16</sup><sup>17</sup>.
  - (b) Information on and representations of the traditional cultural expressions/expressions of folklore which have been so registered or notified [should] [shall]<sup>18</sup> be made publicly accessible at least to the extent necessary to provide transparency and certainty to third parties as to which traditional cultural expressions/expressions of folklore are so protected and for whose benefit.

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<sup>1</sup> Makiese Augusto. Shafiu Adamu Yauri agreed

<sup>2</sup> Justin Hughes proposed deleting the part in square brackets

<sup>3</sup> Makiese Augusto proposed two new paragraphs for Article 7. Shafiu Adamu Yauri agreed

<sup>4</sup> Justin Hughes. Vittorio Ragonesi concurred

<sup>5</sup> Delegation of Mexico

<sup>6</sup> Benny Müller. Anne Le Morvan and Johan Axhamn disagreed

<sup>7</sup> Delegation of the United States of America. See note 30

<sup>8</sup> Delegation of Mexico

<sup>9</sup> Corlita Babb-Schaeffer. See note 2

<sup>10</sup> Delegation of Mexico

<sup>11</sup> Susanna Chung. See note 3

<sup>12</sup> Delegation of the United States of America. See note 30

<sup>13</sup> Delegation of Mexico

<sup>14</sup> Benny Müller. Anne Le Morvan and Johan Axhamn disagreed

<sup>15</sup> Corlita Babb-Schaeffer. See note 2

<sup>16</sup> Delegation of Mexico

<sup>17</sup> Susanna Chung. See note 3

<sup>18</sup> Benny Müller. Anne Le Morvan and Johan Axhamn disagreed

- (c) Such registration or notification is declaratory and does not constitute rights. Without prejudice thereto, entry in the register presumes that the facts recorded therein are true, unless proven otherwise. Any entry as such does not affect the rights of third parties.
- (d) The [office or organization] designated [national]<sup>19</sup> authority<sup>20</sup> receiving such registrations or notifications [should] shall<sup>21</sup> resolve any uncertainties [or disputes] and help to resolve disputes arising<sup>22</sup> as to which [communities] indigenous peoples and non-indigenous peoples<sup>23</sup> and communities [and traditional and other cultural communities]<sup>24</sup><sup>25</sup>, including those in more than one country, should be entitled to registration or notification or should be the beneficiaries of protection as referred to in Article 2, using customary laws, normative systems<sup>26</sup> and processes, alternative dispute resolution (ADR) and existing cultural resources, such as cultural heritage inventories, as far as possible.

[Commentary on Article 7 follows]

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<sup>19</sup> Delegation of the United States of America. See note 30

<sup>20</sup> Delegation of Mexico

<sup>21</sup> Delegation of Mexico

<sup>22</sup> Delegation of Mexico

<sup>23</sup> Corlita Babb-Schaeffer. See note 2

<sup>24</sup> Delegation of Mexico

<sup>25</sup> Susanna Chung. See note 3

<sup>26</sup> Delegation of Mexico. The Delegation explained that “normative systems” comprised knowledge developed and preserved within specific groups of indigenous peoples and communities, and passed on from generation to generation, in oral form. Indigenous normative systems were therefore part of the same cultural matrix as traditional medicine, art and handicrafts, myths of creation, and relationship of exchange, which existed between the communities and with nature. To that extent, internal normative systems constituted TK of indigenous peoples and indigenous peoples should have the right to use their normative systems to resolve any internal disputes that would arise

## COMMENTARY

### ARTICLE 7: FORMALITIES

#### Discussion Overview

Experts considered Article 7, dealing with Formalities, as formulated in document WIPO/GRTKF/IC/17/4 Prov.

Some experts emphasized that that part was closely linked to issues raised under Articles 3 and 4 and, in particular, with the three-layer approach. Any change to Article 7 had to be consistent with corresponding changes in Articles 3 and 4.

As a reminder, registration was considered in the draft provisions as a compulsory formality to enable communities to exercise exclusive rights in their registered TCEs/EoF which were considered particularly valuable parts of their cultural identity.

The experts who spoke on this matter were divided up into two groups.

One expert proposed that Article 7 state that the protection of TCEs/EoF shall not be subject to any formality and that registration by relevant national authorities should be considered as an option that would be used in the interest of transparency, certainty and conservation of TCEs/EoF (but not necessarily, as it appeared, as a formality).

A few other experts considered that protection of TCEs/EoF should, on the contrary, be submitted, as a general principle, to registration as a formality, regardless of the presumed value of some TCEs/EoF compared to others.

A few experts expressed concerns regarding the uncertainty that a differentiated regime of protection, as reflected in Article 3 and 7, might imply for third party users and referred to the need to simplify those articles.

Some of the legal and practical aspects involved in TCEs/EoF registration were also discussed.

A few experts made a plea for an article which would be shorter and leave out the detailed modalities to national authorities. One expert wondered how shared TCEs/EoF would be registered. Observing experts insisted that registration of TCEs/EoF should be managed or controlled by indigenous communities instead of by national authorities, arguing that registration could involve unauthorized public disclosure of TCEs/EoF or undue fixation of oral traditions. One observing expert was of the view that registration had to be managed by an international authority in order to secure the rights of the indigenous peoples and prevent conflicts that shared TCEs/EoF could involve.

#### Comments and Questions by Experts at IWG 1

Shafiu Adamu Yauri said that the measures necessary to protect TCEs/EoF should not seek to copy or adopt copyright laws or rules. It had to be clear that the rights previously acquired by third parties needed to be through good faith, i.e., legitimately. States had to ensure measures to secure the rights acquired by third parties on behalf of their communities. The protection of TCEs/EoF was of its own kind, and its relationship with IP and other forms of protection remained complementary.

Xilonen Luna Ruiz said that it was important to design and develop a database of TCEs, if and only if free, prior and informed consent had been granted by indigenous communities and peoples, as some of these were not interested in the “non-indigenous society” learning more about their most intimate knowledge, even when such knowledge was threatened. Preferably, registration had to take place with assistance from institutions devoted to revitalizing and protecting the cultural heritage of indigenous cultural institutions with the holders of the TCEs, by producing an announcement and establishing clear foundations of the scope of registration and categorization. This also enabled holders to implement a management plan or a plan to strengthen such TCEs. That issue had to be fully incorporated in the working documents.

Natacha Lenaerts wondered how registration in one country would apply in other countries, and what would happen if the same TCE was registered in different countries.

Clara Vargas suggested that only registered TCEs should enjoy protection.

Tomas Alarcón wondered how oral traditions would be recorded in registries.

Debra Harry expressed concern about the public disclosure of registered TCEs.

Thiru Balasubramaniam suggested that the liability for and enforcement of the rights be linked to registration formalities. This would reduce the risks associated with infringement of the *sui generis* regime. Moreover, the registration of the rights also made it feasible to set limits on the terms of economic rights.

## ARTICLE 8:

## SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

1. *[Accessible, appropriate and adequate [enforcement]<sup>1</sup> legal and administrative measures,<sup>2</sup> [and dispute-resolution mechanisms]<sup>3</sup>, border-measures, sanctions and remedies, [including [criminal]<sup>4</sup> and/or<sup>5</sup> civil remedies]<sup>6</sup>, [should] shall<sup>7</sup> be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore.*
2. *Criminal procedures and penalties shall only be available in the case of willful, commercial violation of the protection of traditional cultural expressions/expressions of folklore.<sup>8</sup>*
3. *The [Agency] designated [national]<sup>9</sup> authority<sup>10</sup> referred to in Article 4 should be tasked with, among other things, advising and assisting [communities] indigenous peoples and non-indigenous peoples<sup>11</sup> and communities [and traditional and other cultural communities]<sup>12</sup> [with regard to the enforcement of rights and with instituting civil, [criminal]<sup>14</sup> and administrative proceedings on their behalf]<sup>15</sup> when appropriate and requested by them.]<sup>16</sup>*
4. *The means of redress for safeguarding the protection granted by this instrument should be governed by the legislation of the country where the protection is claimed.<sup>17</sup>*

ARTICLE 8bisDISPUTE RESOLUTION<sup>18</sup> (INCLUDING A SAFEGUARD PRINCIPLE)<sup>19</sup>

[Commentary on Article 8 follows]

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<sup>1</sup> Makiese Augusto

<sup>2</sup> Makiese Augusto

<sup>3</sup> Makiese Augusto

<sup>4</sup> Danny Edwards

<sup>5</sup> Weerawit Weeraworawit

<sup>6</sup> Justin Hughes. As an alternative to deletion, he proposed other language, which is now in paragraph 2. Weerawit Weeraworawit disagreed and pleaded for flexibility

<sup>7</sup> Delegation of Mexico

<sup>8</sup> Justin Hughes

<sup>9</sup> Delegation of the United States of America. See note 30

<sup>10</sup> Delegation of Mexico

<sup>11</sup> Corlita Babb-Schaeffer. See note 2

<sup>12</sup> Delegation of Mexico

<sup>13</sup> Susanna Chung. See note 3

<sup>14</sup> Danny Edwards

<sup>15</sup> Carlos Serpas said that, due to constitutional provisions in El Salvador, the competent body for dealing with criminal or civil proceedings was the judiciary

<sup>16</sup> Natacha Lenaerts

<sup>17</sup> Natacha Lenaerts

<sup>18</sup> Natacha Lenaerts

<sup>19</sup> Margreet Groenenboom. Josephine Reynante disagreed, wanting to avoid forum-shopping

## COMMENTARY

### ARTICLE 8: SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

#### Discussion Overview

Experts considered sanctions and remedies that should apply in cases of infringement of rights as well as modalities for the exercise of the rights for protection, as they are envisaged in Article 8 of document WIPO/GRTKF/IC/17/4 Prov.

Links with other articles, such as Articles 3, 4 and 6, were highlighted.

Some experts made comments and proposals regarding paragraphs (1) and (2) of Article 8, all of which are reflected in the present record.

One proposal concerning paragraph (1) regarded the introduction of a more generic term that would encompass the type of measures that States would be required to take in case of infringement.

The inclusion of criminal remedies in paragraphs (1) and (2) of Article 3 raised some concerns. One expert proposed to restrict the availability of criminal remedies to cases of “willful, commercial violation of the protection of TCEs/EoF”, as reflected in a new paragraph (2).

One proposal aimed at ensuring that non-indigenous peoples could also be granted advice and assistance by the designated national authority in paragraph (2).

It was further proposed to add a new paragraph (4) that stated that the legislation of the country where the protection was claimed should govern the applicable means of redress.

It was also suggested by two experts to add an Article 8bis—to be drafted at a later stage—that would address what was described as a need for a “dispute resolution” and “a safeguarding principle”.

#### Comments and Questions by Experts at IWG 1

Carlos Serpas suggested making reference to international instruments such as the ILO Convention No.169, as well as to some constitutional principles, such as those in the Salvadorian Constitution, which could have an effect on the draft provisions. He also wished to provide the possibility for dispute settlement procedures to be provided on the basis of the procedures used by the protected communities. In cases of infringement, he wanted to ensure that the indigenous peoples and traditional or cultural communities concerned could solve any disputes by applying the same basic principles they had always used for the administration of justice. If third parties outside the community were involved, then naturally the appropriate provisions of the law existing at the state level had to be applied, but when disputes arose between members of the communities, it had to be dealt with on the basis of community procedures.

Gulnara Kaken thought that there was some repetition between Article 8 and Article 6, as some sanctions were mentioned in both articles.

Justin Hughes expressed interest in having a discussion over the appropriateness of crafting sanctions without having in mind the sanctions that the indigenous people or local community would themselves have imposed. He was concerned that the sanctions might be greater than the indigenous people would have imposed for a violation.

Luz Celeste Ríos de Davis suggested that disputes arising at the international level could be dealt with within WIPO, while territorial disputes could be dealt with at the national level, under national legislation.

Tomas Alarcón suggested making express reference to a mechanism for the re-establishment of the protection which has been infringed. It was not only a case of applying punishment for the damage done, but repairing that damage and restoring the *status quo antebellum*.

Thiru Balasubramaniam called attention on the possibility of exceptions in the enforcement of rights, which were separate from, and in addition to, the exceptions to the rights themselves, such as that found in Article 44.2 of the TRIPS Agreement in relation to the three-step test.

Debra Harry said that, in relation to criminal sanctions, there needed to be some sort of legal enforcement of misappropriation as a *sui generis* protection. The instrument was supposed to be unique, so there had to be some sort of legal enforcement mechanism. In the United States of America, tribal governments had their own legal codes to protect their cultural heritage or cultural property, and exercised civil jurisdiction over individuals outside of the communities, if they violated laws in the communities' territories. These decisions held comity with other legal jurisdictions in the country.

#### Drafting Proposals by Observers at IWG 1

Robert Leslie Malezer suggested a new paragraph to Article 8, which would read: "Parties shall have responsibility to provide access to relevant financial and technical assistance to indigenous peoples and communities where socio-economic gaps or other disadvantages adversely affect their rights to maintain and promote TCEs/EoF".

Lázaro Pary suggested alternative language for Article 8: "In cases of breach of the protection for TCEs/EoF, mechanisms for enforcement and dispute resolution mechanisms shall be established". He suggested dealing with criminal sanctions in a separate paragraph. Ronald Barnes agreed.

Ronald Barnes did not support the phrase "including criminal and civil remedies" and preferred "shall" instead of "should." The "criminal and civil remedies" also had to take into consideration Article 9 regarding third party rights. The reference to "the [Agency] designated [national] authority referred in Article 4" had to be based on a *sui generis* authority and system that acted as an advocacy and monitoring body that could take into account the international legal political obligations to the peoples concerned and in relation to the appropriate formalities in Article 7 to ensure the particular status was taken into account.

Paul Kuruk proposed a new paragraph: "A Contracting State undertakes to cooperate with a request made by another Contracting State to facilitate the effective implementation of national laws on TCEs of the Requesting State by adopting appropriate measures to effectuate the service of legal process on, or enforcement of judicial decisions, against a party or parties resident in the Contracting State to which the request is made".

## ARTICLE 9:

## TRANSITIONAL MEASURES

1. *These provisions apply to all traditional cultural expressions/expressions of folklore which, at the moment of the provisions coming into force, fulfill the criteria set out in Article 1.*
2. *[Continuing acts in respect of traditional cultural expressions/expressions of folklore that had commenced prior to the coming into force of these provisions for the past ... years<sup>1</sup> and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into force, subject to respect for rights previously acquired by third parties through prior use in good faith<sup>2</sup>.] The states should take the necessary measures to secure the rights, acknowledged by national law,<sup>3</sup> already acquired by third parties.<sup>4</sup>*
3. *Where the work is deemed offensive or derogatory by the beneficiaries, steps should be taken as soon as is practicable.<sup>5</sup>*

[Commentary on Article 9 follows]

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<sup>1</sup> Lillyclaire Bellamy did not specify the exact number of years

<sup>2</sup> Marisella Ouma

<sup>3</sup> Johan Axhamn. He also agreed with Anne Le Morvan

<sup>4</sup> Anne Le Morvan. Vittorio Ragonesi and Raúl Rodríguez Porras agreed. Heng Gee Lim wondered if it was necessary to specify which rights were acquired by third parties

<sup>5</sup> Heng Gee Lim

## COMMENTARY

### ARTICLE 9: TRANSITIONAL MEASURES

#### Discussion Overview

Experts considered Article 9 that deals with Transitional Measures as contained in document WIPO/GRTKF/IC/17/4 Prov.

Most experts focused on paragraph (2) which provided that protection would have a retroactive effect, and considered that its formulation needed to be more precise. Several reasons were put forward.

A few experts, including observing experts, were of the view that retroactivity had to be refined in accordance with the type of TCEs/EoF that had been used prior to the moment that the provisions had come into force. It was observed that past unauthorized use of protected TCEs/EoF that were left unregistered after the provisions' coming into force would not have to be brought into conformity the same way as past unauthorized use of TCEs/EoF that would be registered for protection.

Other proposals aimed at submitting the transitional "reasonable time" that was granted to third party users to more precise conditions. According to one proposal, transition had to be shorter for past unauthorized use that was "deemed as offensive or derogatory by the beneficiaries."

On the other hand, concerns were raised by a few other experts regarding the effect of Article 9 on the public domain as well as on the rights that were already acquired by third parties before the moment of the provisions' coming into force.

A proposal was made to ensure that the states would take measures to secure already acquired rights acknowledged by national law. A counter proposal was made by an observing expert with a view to granting relevant communities the right to recover TCEs/EoF that had special significance for them in exchange for a reasonable compensation to the users who had acquired rights on those TCEs/EoF prior the provisions coming into force; the expert suggested a new paragraph along those lines.

A few experts were of the view that some WIPO documents, such as the WIPO Development Agenda, the Gap Analysis and the forthcoming study on the public domain, had to be taken into account in considering transitional measures.

#### Comments and Questions by Experts at IWG 1

Thiru Balasubramaniam said that, with respect to works created after the instrument entered into force, all the substantive provisions of the instrument had to apply. With respect to works created before the instrument entered into force, the economic right had to be forward looking and limited only to those works whose revenues exceeded a minimum threshold including possibly different thresholds for different classes of works.

#### Proposals by Observers

Paul Kuruk proposed the following, after the last sentence of Article 9(2), after "third parties": "as further qualified by paragraph 3". He also proposed adding a new paragraph: "With respect to TCEs that have special significance for the relevant communities having rights thereto and whose

TCEs have been taken outside the control of such communities, the communities shall have the right to recover such TCEs upon the payment of reasonable compensation to parties in possession of the TCEs upon the coming into force of this [Convention.]”

## ARTICLE 10:

## RELATIONSHIP WITH INTELLECTUAL PROPERTY PROTECTION AND OTHER FORMS OF PROTECTION, PRESERVATION AND PROMOTION

*[Protection for traditional cultural expressions/expressions of folklore in accordance with these provisions [does not replace and]<sup>1</sup> is [complementary]<sup>2</sup> to protection applicable to traditional cultural expressions/expressions of folklore and [derivatives] [adaptations]<sup>3</sup> thereof in accordance with international law<sup>4</sup> under other intellectual property laws, [laws] legal instruments<sup>5</sup> and programs for the safeguarding, preservation and promotion of cultural heritage, and the diversity of cultural expressions<sup>6</sup> and other legal and non-legal measures available for the protection and preservation of traditional cultural expressions/expressions of folklore.]<sup>7</sup>*

*Protection under this instrument should leave intact and should in no way affect the protection of intellectual property rights. Consequently, no provision of this instrument may be interpreted as prejudicing such protection.<sup>8</sup>*

AS FINAL PROVISION

*The protection of TCEs through the present provisions does not exclude remedies through other types of legal protection.<sup>9</sup>*

TRANS-BOUNDARY COOPERATION (as Article 10bis)

*In instances where TCEs/EoF are located in the territories of neighboring countries, those countries shall, as appropriate, cooperate, support the implementation of this instrument by ensuring that measures taken are supportive of and do not run counter to its objectives.*

*Where the same TCEs/EoF are shared by different countries or by different indigenous or local communities in several jurisdictions, those countries shall cooperate, in close consultation and involvement of indigenous and local communities, if any, in the exercise of implementing the objectives of this instrument.<sup>10</sup>*

[Commentary on Article 10 follows]

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<sup>1</sup> Abbas Bagherpour Ardekani

<sup>2</sup> Margreet Groenenboom

<sup>3</sup> Delegation of the United States of America. See note 57

<sup>4</sup> Abbas Bagherpour Ardekani

<sup>5</sup> Benny Müller

<sup>6</sup> Benny Müller

<sup>7</sup> Natacha Lenaerts

<sup>8</sup> Natacha Lenaerts

<sup>9</sup> Amadou Tankoano. Makiese Augusto and Rachel-Claire Okani concurred

<sup>10</sup> Makiese Augusto

## COMMENTARY

### ARTICLE 10: RELATIONSHIP WITH INTELLECTUAL PROPERTY PROTECTION AND OTHER FORMS OF PROTECTION, PRESERVATION AND PROMOTION

#### Discussion Overview

Experts considered the relationship of the provisions with intellectual property protection and other forms of protection, preservation and promotion, as addressed by Article 10 in document WIPO/GRTKF/IC/17/4 Prov.

Most comments and drafting proposals focused on the relationship between the provisions and the protection of TCEs/EoF offered by other laws, particularly IP laws.

Questions were raised regarding the most appropriate way to describe that relationship, presently described as not replacing and being complementary to those laws. Similarly, other comments and proposals showed that more clarity was needed as to which laws were taken into consideration.

A proposal was made to ensure inclusiveness by bringing in “legal instruments” and programs focusing on “the diversity of cultural expressions” into the list of alternative remedies that would be available to protect or preserve TCEs/EoF. A question was asked by an observing expert regarding the inclusion of customary laws and practices in the list. Another proposal was to replace Article 10 with a more general formulation to emphasize the complementarity between the provisions and other “remedies through other types of legal protection”.

Other comments and proposals illustrated concerns about potential conflicts of laws.

One proposal intended to make sure that only laws that were “in accordance with international law” would remain unaffected by the provisions. Likewise, one observing expert proposed explicit language to ensure that the envisaged provisions would prevail on legal regimes that did not protect TCEs/EoF or would protect TCEs/EoF by IP laws for a limited period of time only.

Potential conflicts of laws gave rise to an alternative proposal that stated that “protection of intellectual property rights” would remain unaffected by the protection by the forthcoming instrument. Linkage with comments and proposals made on Article 9 regarding transitional measures was emphasized.

One expert suggested that wording should be inserted indicating which, between the instrument and IP laws, would prevail in case of conflict.

Potential conflict between the exceptions as envisaged in Article 5 paragraph (1) and the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was mentioned.

Additionally, some experts, including one observing expert, deemed it appropriate to address aspects that concerned trans-boundary cooperation between states in considering this Article. A proposal was made in that regard to the effect of introducing a new Article 10bis.

### Comments and Questions by Experts at IWG 1

Arjun Vinodrai wondered how States could reconcile the potential conflict and obligations in Article 5(1) with those in treaties such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

Meenakshi Negi proposed inserting some wording to indicate which, between the instrument and IP laws, would prevail in case of conflict. Preston Hardison and Tomas Alarcón agreed, and wished to define the hierarchy between protection for TCEs and IP.

Nemon Mukumov, in a written statement, said that the global and international issues relating to the protection of folklore had to be reflected in international acts, and specific issues in national legislation. In that way, tradition of the international and specific protection of copyright would be preserved.

Greg Younging disagreed with the proposal by Natacha Lenaerts. He also wondered if in the phrase “other legal and non-legal measures available for the protection and preservation of TCEs/EoF” included customary law. Debra Harry agreed and added that reference be also made to legal jurisdictions by indigenous peoples, so as to ensure that indigenous people had the ability to provide remedies and implement sanction themselves.

Ronald Barnes also disagreed with the proposal by Natacha Lenaerts if it was to indicate that the existing laws that were in place were discriminating to indigenous peoples whether they were national or international.

### Drafting Proposals by Observers at IWG 1

Paul Kuruk suggested adding a paragraph, which would read: “Contracting States undertake to cooperate with the requests made by another Contracting State to facilitate the effective implementation of its national laws including, but not limited to, service of process or enforcement of judicial awards”.

Elizabeth Reichel proposed making reference to “cultural diversity” and to “sustainable development”.

Preston Hardison suggested the following text: “Where TCEs/EoF are currently protected by IP laws with limited terms of protection, the indefinite terms of protection of TCEs/EoF shall take precedence. Where TCEs/EoF are currently not protected and fulfill the criteria for protection under Article 1, they shall be protected within this regime”.

ARTICLE 11:

INTERNATIONAL AND REGIONAL PROTECTION

*The rights and benefits arising from the protection of traditional cultural expressions/expressions of folklore under national measures or laws that give effect to these international provisions should be available to all eligible beneficiaries, as determined in Article 2<sup>1</sup> who are nationals or [habitual]<sup>2</sup> residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign beneficiaries should mutually<sup>3</sup> enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions.*

[Commentary on Article 11 follows]

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<sup>1</sup> Khamis Al-Shamakhi

<sup>2</sup> Delegation of Mexico. Khamis Al-Shamakhi agreed

<sup>3</sup> Charity Mwape Salasini

## COMMENTARY

### ARTICLE 11: INTERNATIONAL AND REGIONAL PROTECTION

#### Discussion Overview

Experts considered Article 11, dealing with the question of how rights and interests of foreign holders of rights in TCEs/EoF would be recognized in national laws, as formulated in document WIPO/GRTKF/IC/17/4 Prov.

Regarding national treatment, three proposals were made in order to make the text more precise. Some requested that customary law be included in or complement the “national measure or laws” applicable to all the national or residents of a particular state. One expert asked whether there would be an appeal mechanism in the customary law setting and described that as a big challenge. One observing expert suggested adding regional measures or laws to those applicable based on national treatment.

One expert suggested that reciprocity be contemplated as an option in providing international protection. Similarly, a few experts highlighted the fact that protection of shared TCEs/EoF between communities that spread over different countries had to be addressed; they argued that shared TCEs/EoF could require specific cooperation mechanisms among states that differed from national treatment. It was reminded that a proposal had been made under Article 10 to introduce an additional Article 10bis.

One observing expert was of the view that national treatment might not be appropriate regarding international protection of TCEs/EoF that were shared by a source community and its Diaspora, and that those TCEs/EoF needed to be addressed as a specific issue.

#### Comments and Questions by Experts at IWG 1

Arjun Vinodrai wondered if there would be appeal mechanisms in the customary law setting, as this could pose a very big challenge.

Heng Gee Lim wished to have some wording in Article 11 dealing with “shared folklore”.

Luz Celeste Ríos de Davis suggested basing protection on the principle of reciprocity, such as was the case in Panama, for the purposes of protection, use and marketing of collective IP rights of indigenous peoples, indigenous artistic and traditional expressions of other countries. When both countries were parties to a treaty, protection would be provided. Although the national treatment approach, in the field of IP, appeared to be an appropriate starting point, that had to be supplemented with other principles, such as reciprocity, specifically when that maintained a link with the legal condition and customary laws of the beneficiaries of protection.

#### Drafting proposals by observers at IWG 1

Saoudata Walet Aboubacrine suggested adding a reference to “regional” provisions. Ronald Barnes agreed.

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